ADA RESTORATION ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 3195

OCTOBER 4, 2007

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ADA RESTORATION ACT OF 2007

THURSDAY, OCTOBER 4, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:11 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Nadler, Davis, Wasserman Schultz, Franks, and Issa.

Also present: Representative Sensenbrenner.

Staff present: David Lachmann, Subcommittee Chief of Staff; Heather Sawyer, Majority Counsel; Susana Gutierrez, Professional Staff Member; and Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Today's hearing will examine the current state of the Americans with Disabilities Act and H.R. 3195, the "ADA Restoration Act of 2007."

[The bill, H.R. 3195, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 3195

To restore the intent and protections of the Americans with Disabilities Act of 1990.

IN THE HOUSE OF REPRESENTATIVES

JULY 26, 2007

Mr. HOYER (for himself, Mr. SENSENBRENNER, Mr. ACKERMAN, Mr. ALLEN, Mr. ANDREWS, Mr. BACHUS, Ms. BALDWIN, Mr. BERMAN, Mr. BILBRAY, Mr. BISHOP of New York, Mr. BLUMENAUER, Ms. BORDALLO, Mr. BOSWELL, Mr. BOUCHER, Ms. CORRINE BROWN of Florida, Mr. BUTTERFIELD, Mr. CALVERT, Mr. CARDOZA, Mr. CARNEY, Mr. CHANDLER, Mr. CLAY, Mr. CLEAVER, Mr. CLYBURN, Mr. COBLE, Mr. COHEN, Mr. CONYERS, Mr. COSTA, Mr. COSTELLO, Mr. COURTNEY, Mr. CUMMINGS, Mr. DAVIS of Illinois, Mr. TOM DAVIS of Virginia, Mr. DEFAZIO, Ms. DEGETTE, Mr. DELAHUNT, Ms. DELAURO, Mr. DINGELL, Mr. DREIER, Mr. EHLERS, Mr. EMANUEL, Mrs. EMERSON, Mr. ENGEL, Mr. ENGLISH of Pennsylvania, Mr. ETHERIDGE, Mr. FARR, Mr. FERGUSON, Mr. FILNER, Mr. FRANK of Massachusetts, Mr. FRANKS of Arizona, Mr. FRELINGHUYSEN, Mr. GALLEGLY, Ms. GIFFORDS, Mr. GRIJALVA, Mr. HALL of New York, Mr. HASTINGS of Florida, Mr. HINOJOSA, Mr. HOLDEN, Mr. HOLT, Mr. HONDA, Mr. ISRAEL, Mr. ISSA, Mr. JEFFERSON, Mr. JOHNSON of Georgia, Mrs. JONES of Ohio, Ms. KAPTUR, Mr. KENNEDY, Mr. KILDEE, Ms. KILPATRICK, Mr. KIND, Mr. KING of New York, Mr. KIRK, Mr. KNOLLENBERG, Mr. LAHOOD, Mr. LANGEVIN, Mr. LANTOS, Mr. LEVIN, Mr. LEWIS of Georgia, Mr. LEWIS of California, Mr. LOEBSACK, Ms. ZOE LOFGREN of California, Mrs. LOWEY, Mrs. MALONEY of New York, Mr. MARKEY, Mr. MATHESON, Ms. MATSUI, Mrs. MCCARTHY of New York, Ms. MCCOLLUM of Minnesota, Mr. MCDERMOTT, Mr. MCGOVERN, Mr. MCHUGH, Mr. MCNULTY, Mr. MILLER of North Carolina, Mr. GEORGE MILLER of California, Mr. MORAN of Virginia, Mr. PATRICK J. MURPHY of Pennsylvania, Mr. NADLER, Mr. NEAL of Massachusetts, Ms. NORTON, Mr. NUNES, Mr. OBERSTAR, Mr. PAYNE, Mr. PERLMUTTER, Mr. PETRI, Mr. RAHALL, Mr. RAMSTAD, Mr. RANGEL, Mr. RODRIGUEZ, Mr. ROSKAM, Mr. ROTHMAN, Ms. ROYBAL-ALLARD, Mr. RUPPERSBERGER, Mr. RYAN of Wisconsin, Ms. LORETTA SANCHEZ of California, Mr. SARBANES, Ms. SCHAKOWSKY, Mr. SCOTT of Virginia, Mr. SHAYS, Ms. SHEA-PORTER, Ms. SLAUGHTER, Mr. SMITH of New Jersey, Ms. SOLIS, Mr. SOUDER, Mr. SPACE, Mr. STARK, Ms. SUTTON, Mrs. TAUSCHER, Mr. TIAHRT, Mr. TIERNEY, Mr.

TOWNS, Mr. UDALL of New Mexico, Mr. VAN HOLLEN, Mr. VISCLOSKY, Mr. WALSH of New York, Ms. WASSERMAN SCHULTZ, Ms. WATSON, Mr. WAXMAN, Mr. WELCH of Vermont, Mr. WELDON of Florida, Ms. WOOLSEY, Mr. WYNN, Mr. YOUNG of Florida, Mr. YOUNG of Alaska, Mr. WALZ of Minnesota, Mr. MCCOTTER, and Mr. DICKS) introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committees on the Judiciary, Transportation and Infrastructure, and Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To restore the intent and protections of the Americans with Disabilities Act of 1990.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "ADA Restoration Act of 2007".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "establish a clear and comprehensive prohibition of discrimination on the basis of disability," and provide broad coverage and vigorous and effective remedies without unnecessary and obstructive defenses;

(2) decisions and opinions of the Supreme Court have unduly narrowed the broad scope of pro-

tection afforded in the ADA, eliminating protection for a broad range of individuals who Congress intended to protect;

(3) in enacting the ADA, Congress recognized that physical and mental impairments are natural parts of the human experience that in no way diminish a person's right to fully participate in all aspects of society, but Congress also recognized that people with physical or mental impairments having the talent, skills, abilities, and desire to participate in society are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(4) Congress modeled the ADA definition of disability on that of section 504 of the Rehabilitation Act of 1973, which, through the time of the ADA's enactment, had been construed broadly to encompass both actual and perceived limitations, and limitations imposed by society;

(5) the broad conception of the definition had been underscored by the Supreme Court's statement in its decision in School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987), that the section 504 definition "acknowledged that society's accumulated myths and fears about disability and disease

are as handicapping as are the physical limitations that flow from actual impairment";

(6) in adopting the section 504 concept of disability in the ADA, Congress understood that adverse action based on a person's physical or mental impairment is often unrelated to the limitations caused by the impairment itself;

(7) instead of following congressional expectations that disability would be interpreted broadly in the ADA, the Supreme Court has ruled, in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002), that the elements of the definition "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and, consistent with that view, has narrowed the application of the definition in various ways; and

(8) contrary to explicit congressional intent expressed in the ADA committee reports, the Supreme Court has eliminated from the Act's coverage individuals who have mitigated the effects of their impairments through the use of such measures as medication and assistive devices.

(b) PURPOSE.—The purposes of this Act are—

(1) to effect the ADA's objectives of providing "a clear and comprehensive national mandate for the

elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by restoring the broad scope of protection available under the ADA;

(2) to respond to certain decisions of the Supreme Court, including Sutton v. United Airlines, Inc., 527 U.S. 471 (1999), Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999), Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999), and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that have narrowed the class of people who can invoke the protection from discrimination the ADA provides; and

(3) to reinstate original congressional intent regarding the definition of disability by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived impairment, or record of impairment, or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning disability or particular disabilities, or by the failure to remove societal and institutional barriers, including communication, transportation, and architectural barriers, and the failure to provide reasonable modifications to policies, practices, and procedures, rea-

sonable accommodations, and auxiliary aids and services.

SEC. 3. CODIFIED FINDINGS.

Section 2(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101) is amended—

(1) by amending paragraph (1) to read as follows:

"(1) physical or mental disabilities are natural parts of the human experience that in no way diminish a person's right to fully participate in all aspects of society, yet people with physical or mental disabilities having the talent, skills, abilities, and desires to participate in society frequently are precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;".

(2) by amending paragraph (7) to read as follows:

"(7) individuals with disabilities have been subject to a history of purposeful unequal treatment, have had restrictions and limitations imposed upon them because of their disabilities, and have been relegated to positions of political powerlessness in society; classifications and selection criteria that exclude

persons with disabilities should be strongly disfavored, subjected to skeptical and meticulous examination, and permitted only for highly compelling reasons, and never on the basis of prejudice, ignorance, myths, irrational fears, or stereotypes about disability;".

SEC. 4. DISABILITY DEFINED.

Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended—

(1) by amending paragraph (2) to read as follows:

"(2) DISABILITY.—

"(A) IN GENERAL.—The term 'disability' means, with respect to an individual—

"(i) a physical or mental impairment;

"(ii) a record of a physical or mental impairment; or

"(iii) being regarded as having a physical or mental impairment.

"(B) RULE OF CONSTRUCTION.—

"(i) The determination of whether an individual has a physical or mental impairment shall be made without considering the impact of any mitigating measures the individual may or may not be using or

whether or not any manifestations of an impairment are episodic, in remission, or latent.

"(ii) The term 'mitigating measures' means any treatment, medication, device, or other measure used to eliminate, mitigate, or compensate for the effect of an impairment, and includes prescription and other medications, personal aids and devices (including assistive technology devices and services), reasonable accommodations, or auxiliary aids and services.

"(iii) Actions taken by a covered entity with respect to an individual because of that individual's use of a mitigating measure or because of a side effect or other consequence of the use of such a measure shall be considered actions taken on the basis of a disability under this Act.".

(2) by redesignating paragraph (3) as paragraph (7) and inserting after paragraph (2) the following:

"(3) PHYSICAL IMPAIRMENT.—The term 'physical impairment' means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss

affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine.

"(4) MENTAL IMPAIRMENT.—The term 'mental impairment' means any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities.

"(5) RECORD OF PHYSICAL OR MENTAL IMPAIRMENT.—The term 'record of physical or mental impairment' means having a history of, or having been misclassified as having, a physical or mental impairment.

"(6) REGARDED AS HAVING A PHYSICAL OR MENTAL IMPAIRMENT.—The term 'regarded as having a physical or mental impairment' means being perceived or treated as having a physical or mental impairment whether or not the individual has an impairment.".

SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(1) in subsection (a), by striking "against a qualified individual with a disability because of the disability of such individual" and inserting "against an individual on the basis of disability"; and

(2) in subsection (b), in the matter preceding paragraph (1), by striking "discriminate" and inserting "discriminate against an individual on the basis of disability".

SEC. 6. QUALIFIED INDIVIDUAL.

Section 103(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12113(a)) is amended by striking "that an alleged application" and inserting "that—

"(1) the individual alleging discrimination under this title is not a qualified individual with a disability; or

"(2) an alleged application".

SEC. 7. RULE OF CONSTRUCTION.

Section 501 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201) is amended by adding at the end the following:

"(c) BROAD CONSTRUCTION.—In order to ensure that this Act achieves its purpose of providing a comprehensive prohibition of discrimination on the basis of disability, the provisions of this Act shall be broadly construed to advance their remedial purpose.

"(f) REGULATIONS.—In order to provide for consistent and effective standards among the agencies responsible for enforcing this Act, the Attorney General shall promulgate regulations and guidance in alternate accessible formats implementing the provisions herein. The Equal Employment Opportunity Commission and Secretary of Transportation shall then issue appropriate implementing directives, whether in the nature of regulations or policy guidance, consistent with the requirements prescribed by the Attorney General.

"(g) DEFERENCE TO REGULATIONS AND GUIDANCE.—Duly issued Federal regulations and guidance for the implementation of this Act, including provisions implementing and interpreting the definition of disability, shall be entitled to deference by administrative bodies or officers and courts hearing any action brought under this Act.".

○

Mr. NADLER. The Chair recognizes himself for 5 minutes for an opening statement.

The Americans with Disabilities Act is a success story, but it is also a promise that has yet to be fulfilled. Its coverage and its enforcement do not ensure full access to American life. I believe we have waited long enough and we really cannot afford to let these wrongs go unaddressed longer.

Although it often gets lost in the debate, the ADA is a civil rights bill. It is often treated as if it is something else. That is because unlike many civil rights laws, this one requires people to spend money, to make an effort to do what is right.

I have very little sympathy for complaints of this nature. No business would make its customers climb a rope to make a purchase. They provide elevators and a variety of other means to bring customers in. Yet when it comes to people who need other ways to enter a building, all of a sudden, it's a huge problem. That is a wrong perception.

The same is true in employment. A society is poorer when it fails to take full advantage of the talents of all of its members.

If not in the name of simple decency and justice, then in the name of rational self-interest, we must ensure that the promise of the ADA is fulfilled now. Unfortunately, the Supreme Court has gone out of its way to undermine Congress' clear intent. Somehow the Court has erected a monstrous Catch-22, in which an individual can face discrimination on the basis of an actual or perceived disability and yet be deemed not sufficiently disabled to trigger a legal remedy under the ADA.

That defies logic, it defies reason and it defies the plain text of the ADA. Where in the act does it say, as the Court has found, that mitigating measures must be taken into account when determining whether an individual is disabled?

In fact, Congress said just the opposite. The report on the ADA said, "whether a person has a disability should be assessed without regard to the availability of mitigating measures. . . . For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments such as epilepsy or diabetes, which substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."

Somehow Congress wasn't clear enough for the Court. As a result, people whose vision is correctible with glasses or whose epilepsy can be controlled with medication are not considered disabled under the Court ruling. So we are in the odd position in which Congress says that a person is disabled, the ADA says they are disabled, they suffer discrimination because they are disabled, but the Supreme Court says they cannot get to Court because they are not disabled.

The ADA Restoration Act, which was introduced by our distinguished majority leader, and I always am interested when we see a bill called the so-and-so restoration act, because it means we think the Supreme Court has misinterpreted what Congress said, which it often has. But the ADA Restoration Act, which was intro-

duced by our distinguished majority leader Mr. Hoyer, and which has bipartisan support in this Committee, which includes myself, the Ranking Member of the Subcommittee, the Chairman of the full Committee, is necessary if only to tell the Court that we really meant what we said.

While these changes are long overdue, they are also especially timely. Thousands of our men and women in uniform are returning home with serious injuries, including the loss of limbs, head trauma, damage to their vision and their hearing and a variety of other life-altering injuries. We cannot stand by and allow them to come home to face discrimination without a legal remedy.

Anyone who has ever made a speech about supporting our troops should have a special interest in the passage of this bill. We owe these young Americans no less.

I am pleased that we have such distinguished witnesses today who will help layout the problem and who will discuss the kinds of solutions necessary to ensure that the promise of the ADA is fulfilled. I would also like to take a moment to acknowledge the many guests who are here today to attend this hearing. I want the record to reflect the enormous grassroots support for this endeavor.

To assist in the fullest participation possible, the Committee has provided for this room to be accessible and for sign language interpreter and closed captioning. I can ensure everyone it wasn't hard at all to arrange.

I welcome our witnesses. I yield back the balance of my time.

I would now recognize our distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, I also welcome the majority leader, the distinguished gentleman. I appreciate you being here today, sir.

Mr. Chairman, let me begin by saying I strongly support the Americans with Disabilities Act. For too long members of the disabled community were forced to cope not only with their own disabilities but with the invidious discrimination practiced by others.

Congress rightfully corrected that wrong in 1990 when it passed the Americans with Disabilities Act, with the strong support of then-President Bush.

The ADA defines disability as, "A physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment or being regarded as having such an impairment."

In 1999, the Supreme Court handed down three cases on the same day that addressed this definition. Those three cases and another more recent case were all decided unanimously or by a 7-2 vote. In interpreting the scope of the ADA, the Supreme Court looked to the Congressional findings codified in the Act which direct its application to 43 million disabled Americans, namely those Americans who have an impairment that substantially limits one or more of their major life activities.

The legislation we discuss today would, among other things, strike those words from the ADA, and I look forward to exploring ramifications of that with the witnesses here today and with the

hope of making sure that H.R. 3195 strikes a just balance in all ways.

In *Sutton v. United Airlines,* with Justice O'Connor writing the majority opinion in which David Souter joined, and with Justice Ginsberg concurring in the judgment, the Supreme Court stated, "We hold that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individuals impairment, including in this instance eyeglasses and contact lenses."

The Court reasoned as follows, "Looking at the act as a whole, it is apparent that if a person is taking measures to correct for or mitigate a physical or mental impairment, the effects of those measures, both positive and negative, must be taken into account when judging whether that person is, quote, 'substantially limited' in a major life activity and, thus, disabled under the act. A disability exists only where an impairment substantially limits a major life activity, not where it might, could or would be substantially limiting if mitigating measures were not taken. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected, it does not substantially limit a major life activity. Whether a person has a disability under the ADA is an individual inquiry."

Now, I understand that there remain certain concerns regarding the effects of *Sutton* and other Supreme Court decisions, and I am a cosponsor of H.R. 3195, but I do want to say that I have some concerns that H.R. 3195 as currently drafted may go beyond even what the sponsors of the bill are intending, and I hope this will be considered as this bill moves through the process.

Mr. Chairman, I am fortunate to have one of the most productive members of my staff, a gentleman by the name of Brian Van Hovel, that has Charcot-Marie-Tooth Disease that completely paralyzes him except from—he is only able to turn his head. That is the only physical capability he has other than his speech. His lungs are charged with air and yet he speaks through his computer and is literally, truly, one of the most productive members we have of our staff. And so I hope that he is listening here today, because in large part he is in my heart as we move through these proceedings.

I look forward to hearing from our witnesses. Again, I welcome the majority leader, and I am especially pleased to see my colleague and former Chairman, Jim Sensenbrenner's wife, Cheryl, here with us today. I look forward to hearing from all of you.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

In the interest of proceeding to our witness and mindful of our busy schedules, I would ask that other Members submit their statements for the record.

I will withdraw that and recognize the Chairman of the full Committee.

Mr. CONYERS. It is my pleasure to ask unanimous consent to enter my statement into the record, because 17 years ago we marched up this Hill and now here we are again, reexamining the decisions of the Supreme Court and we are very constructive.

I am proud to be a cosponsor, and I said at this point in my career, Mr. Hoyer, that I would never repeat anything that anybody had said before me. The only problem is, I wanted to point out that the most active supporter of the Americans with Disabilities Act is Cheryl Sensenbrenner, but I was co-opted on that, so I will ask unanimous consent to put my statement in the record.

Thank you very much.

[The prepared statement of Mr. Conyers is available in the Appendix.]

Mr. NADLER. Without objection. And I would ask that other Members submit their statements for the record.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing, although the Chair hopes we won't have to do that.

As we ask questions of our witnesses, the Chair will recognize Members in the order they are in the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

Our first witness is the Honorable Steny Hoyer, the majority leader of the House of Representatives, and importantly the representative of Maryland's Fifth Congressional District. Now serving his 14th term in Congress, he also became the longest-serving Member of the U.S. House of Representatives from Maryland in history on June 4, 2007.

Among his other accomplishments, Congressman Hoyer is perhaps best known for guiding the landmark Americans with Disabilities Act to passage. He has continued his leadership in fighting for the rights of the disabled. He was elected to the Maryland Senate at the age of 27, and just a few years later at the age of 35, he was elected president of the Senate, the youngest ever in State history.

I am pleased to welcome our distinguished colleague to the Subcommittee. Your written statement will be made part of the record in its entirety. I would ask you to now summarize your testimony in 5 minutes or less. To help you stay within that time, as you know, there is a timing light at the table. When 1 minute remains, the light will switch from green to yellow, then red when the 5 minutes are up.

Now that we have gone through the usual paraphernalia, I am glad to recognize the witness and you may proceed.

TESTIMONY OF THE HONORABLE STENY H. HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND, AND MAJORITY LEADER, U.S. HOUSE OF REPRESENTATIVES

Mr. HOYER. Thank you very much for this opportunity to appear before this Committee and thank you for proceeding quickly, Chair-

man Nadler and Ranking Member Franks, thank you very much for your remarks and for your co-sponsorship of this legislation.

The distinguished Chairman of the Committee, John Conyers, my good and dear friend, who has been a giant in terms of ensuring that all Americans have their rights observed as the Constitution perceived, was an extraordinarily effective and important leader in the adoption of the Americans with Disabilities Act, working with the first President Bush, who signed this legislation.

And I also want to thank my good friend and cosponsor of this legislation, he and I are partners in this effort, Jim Sensenbrenner. It has been observed now twice, I will observe a third time, and maybe I think I mention it in my remarks as well, that Cheryl Sensenbrenner has been herself a giant in not only the initial adoption of the Americans with Disabilities Act but during those 17 years that have transpired since that time, been an extraordinarily effective advocate.

I want to thank the other Members of the Subcommittee for being with us as well.

Let me make an observation at the outset. This legislation essentially adopts the premise to all the courts, Supreme and otherwise, perhaps we weren't as clear as we needed to be on what we clearly intended.

If in fact we weren't as clear and, therefore, you interpreted it differently, then it is essential for us to pass this legislation, to clarify what clearly, unequivocally and absolutely was our intent.

I want to thank you for holding this hearing. Let me assure you that one of the things at the outset of my testimony. The purpose of this legislation is straightforward and unambiguous. The bill does not seek to expand the rights guaranteed under the landmark Americans with Disabilities Act. Mr. Franks had expressed that concern, and that focused and said, it seeks to clarify the law, restoring the scope of protection available under the ADA, responding to Court decisions that have sharply restricted the class of people who can invoke protection under the law and reinstating the original congressional intent when the ADA passed.

Mr. Sensenbrenner and I have talked about that. That is and was our intent and continues to be.

When the first President Bush signed the ADA into law on July 26, 1990, he hailed it as, "The world's first comprehensive declaration of equality for people with disabilities. This landmark civil rights law prohibited discrimination against Americans with disabilities in the workplace, public accommodations and other settings. We knew that it would not topple centuries of prejudice overnight. But we believed that it could change attitudes and unleash the talents of millions of Americans with disabilities.

And we were right. Since its enactment, thousands of Americans with disabilities have entered the workplace, realizing self-sufficiency for the first time in their lives. However, despite our progress, the courts, including the U.S. Supreme Court, have narrowly interpreted the ADA, limiting its scope and undermining its intent. That is the purpose of this legislation, to clarify that intent.

Let me be clear. When we wrote the ADA, we intentionally used a definition of disability that was broad, borrowing from an existing definition from the Rehab Act of 1973. We did this because the

courts had generously interpreted this definition in the Rehabilitation Act and we thought using established language could help avoid a potentially divisive political debate over the definition of disability. Unfortunately, we made a mistake.

Therefore, we could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because with medication they would be considered too functional to meet the definition of disabled. Nor could we have fathomed a situation where the individual may be considered too disabled by an employer to get a job, but not disabled enough by the courts to be protected by the ADA from discrimination. What a contradictory position that would have been for the Congress to take.

The Supreme Court's decision in *Sutton*, *Kirkingnirg* and *Murphy* in 1999 and *Toyota Manufacturing* in 2002 are, simply put, misinterpretations of what we intended and, in my opinion, of the law.

In *Toyota*, for example, Justice O'Connor writing for the Court, said the terms "substantially limited" and "major life activities" need to be "strictly interpreted to create a demanding standard for qualifying as disabled." The Court went on to say, "Substantially limited means to prevent or severely restrict."

This was not our intent when Congress passed the ADA. Nor did we anticipate that, contrary to our explicit instructions, the Court would eliminate from the act's coverage individuals who had mitigated the effects of their impairment with medication or assistive devices, as in *Sutton*, *Murphy* and *Kirkingburg*.

Again, this is not what Congress intended when it passed the ADA. Tony Coehlo mitigates his disability. But for us to have said if he mitigates, my failing to employ Tony Coehlo because he is an epileptic, but because it is mitigated that the discrimination somehow does not exist, what an absurd result that would be.

Simply put, the point of the ADA is not disability. It is the prevention of wrongful and unlawful discrimination. Let me give you an example. I am not Catholic, but let's say for the purpose of argument I was Catholic. And let's say an employer would not hire me if I were a Catholic. Only if I could prove I was a Catholic, which I was not, would I be able to claim I am being discriminated against under the logic of the disability.

That makes no sense, and what we are doing here is to clarify our intent. H.R. 3195 introduced by myself and Congressman Sensenbrenner, the former Chairman of the Judiciary Committee and a strong supporter of this legislation when we passed it—he and I were partners then—is designed to restore the broad reach of ADA that we believe was plain in 1990.

Among other things, the bill will, first point, amend the definition of disability so that people who Congress originally intended to protect from discrimination are covered under the ADA. We adopted the original definition, which was broadly interpreted by the courts in the Rehab Act, but that has not been the case, which is why we have to take this action, to restore, not to change, prevent courts from considering mitigating measures, such as eyeglasses or medication, when determining whether a person qualifies for protection under the law, and in addition modify findings

in the ADA that have been used by the courts to support a narrow reading of disability.

Specifically, this bill strikes the finding pertaining to 43 million Americans. We use that figure, Mr. Franks has quoted it again today, and as well as deleting that, the finding pertaining to discrete and insular minority. Again, what we are talking about is discrimination against people, against individuals, who are guaranteed under our Constitution equal rights and equal access to opportunity, to life, liberty and the pursuit of happiness.

Let me conclude by noting that this past July 26 we marked the 17th anniversary of this landmark law. I believe that its promise remains unfulfilled, but very much still within reach. Passage of this legislation, H.R. 3195, is imperative, Mr. Chairman and Members of this Committee, to restoring Congressional intent, to achieving the ADA's promise and to creating a society in which Americans with disabilities can realize their potential and be the assets to this country that we know they can be as well as to themselves.

Thank you very much, Mr. Chairman, for this opportunity to appear before you.

By the way, if you ask me any complicated questions, my lawyer, as I refer to her, distinguished professor at Georgetown University, Chai Feldblum, is here. She will be one of your witnesses, but if the questions are tough I will simply turn to her, as I did throughout the course of the consideration of the Americans with Disabilities Act. She did an extraordinary job working with Congressman Steve Bartlett, Republican Member of Congress from Texas, elected mayor of Dallas, now a distinguished representative in the business community in this city. But I will turn to her for the tough ones.

Mr. NADLER. Thank you very much.

I know the distinguished majority leader has many demands on his mind, so do any Members have any questions of the majority leader?

If not, the gentleman is excused with the thanks of the Subcommittee, even though he didn't need the assistance of a counselor for those tough questions.

Mr. HOYER. Mr. Chairman, those questions I can handle. Thank you very much.

Mr. NADLER. I would now like to introduce our second panel. I would invite the second panel to come to the table and be seated.

Mr. HOYER. Mr. Chairman?

Mr. NADLER. Withdraw that again.

Without objection, the distinguished majority leader is recognized again.

Mr. HOYER. We have one of the most extraordinary representatives in our presence today. Her husband was a giant, in league with the Martin Luther Kings and John Lewises as it relates to those with disabilities.

Justin Dart was my friend. Justin Dart was one of the great leaders of this country. And I did not note the presence of his wife, Yoko Dart, who is just an extraordinary human being, and she has been faithful to Justin's dream and a partner in his work, and I wanted to recognize her presence.

We thank you for all you have done.

Mr. NADLER. We are pleased to welcome her and—— [Applause.]

Mr. HOYER. Mr. Chairman, this is Justin Dart's hat, and I know that he is with us.

Mr. NADLER. We are pleased to welcome her and we are pleased to welcome Mr. Dart's hat. [Laughter.]

And now would the second panel please assume seats at the table.

While they are doing that, I will begin the introduction of our second panel.

Cheryl Sensenbrenner appears today as chairwoman of the Board of the American Association of People with Disabilities, the largest national nonprofit trust disability member organization in the United States. AAPD is dedicated to ensuring economic self-sufficiency and political empowerment for the more than 56 million Americans with disabilities.

Mrs. Sensenbrenner has been married to Congressman F. James Sensenbrenner, our former Chairman, for more than 30 years. They have two sons, Frank and Bob.

Her younger sister, Tara, has an intellectual disability. In 1972, as a passenger in a car accident, Mrs. Sensenbrenner sustained a spinal cord injury at the T12 level. Mrs. Sensenbrenner has worked in a number of Republican Party positions, both before and after her injury.

Stephen Orr is a licensed pharmacist from Rapid City, South Dakota. Mr. Orr experienced discrimination based upon his diabetes and was found not to be disabled under the Americans with Disabilities Act. He is here today to share his story with the Subcommittee.

Mr. Orr has two sons and a daughter and serves as a volunteer for the American Diabetes Association.

Michael Collins is the executive director of the National Council on Disability, the NCD. The NCD is an independent Federal agency charged with advising the President and Congress about the broad spectrum of issues of importance to people with disabilities. NCD activities are governed by a 15-member council that is appointed by the President and confirmed by the Senate.

Prior to joining NCD, Mr. Collins was the executive director of the California State Independent Living Center, a State agency working to maximize opportunities for persons with disability.

Lawrence Lorber is a partner in the Washington, D.C. office of Proskauer Rose LLC. Mr. Lorber is an employment law practitioner who counsels and represents employers in connection with all aspects of labor and employment law. Mr. Lorber testifies today on behalf of the Chamber of Commerce, the world's largest business federation, representing more than 3 million businesses.

Chai Feldblum is a professor of law at Georgetown University Law Center in Washington and Director of Georgetown's Federal Legislation Clinic. On behalf of various organizational clients at the Federal Legislation Clinic, Professor Feldblum has been involved in a range of Federal legislative and administrative issues dealing with disability over the past 15 years, including civil rights, health, benefits and immigration.

I am pleased to welcome all of you.

As a reminder, each of your written statements will be made part of the record in its entirety.

I would ask that you now summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up.

It is customary in this Committee on swearing the witnesses, so would you please—would the witnesses please stand, those who can.

Will you please hold up your right hand. Do you all swear or affirm that the testimony you are about to give is the complete truth as far as you know?

Thank you.

Let the record reflect that all of the witnesses responded in the affirmative.

We will first hear from Mrs. Sensenbrenner. Mrs. Sensenbrenner is recognized for 5 minutes.

TESTIMONY OF CHERYL SENSENBRENNER, CHAIR, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES

Ms. SENSENBRENNER. Thank you, Mr. Chairman.

Good morning.

Chairman Nadler, Ranking Member Franks and Members of the House Judiciary Subcommittee, thank you for the invitation today to discuss the topic of ADA Restoration, an issue that affects the ability of literally millions of people with disabilities, our ability to enter and maintain our participation in the American workforce.

My name is Cheryl Sensenbrenner, and I am pleased to offer my testimony today as the board chair of the American Association of People with Disabilities, AAPD.

AAPD is the largest national cross-disability membership organization in the United States.

But I must start out my testimony by saying I am so proud of my husband, Congressman Jim Sensenbrenner, as well as Majority Leader Hoyer, for their hard work and leadership in introducing this legislation.

But I will assure you, like them, I will be around, I will continue to work relentlessly and keep on working on this bill until it is passed.

But in addition to my affiliation with AAPD, I offer my testimony today based on my own experiences as a disabled woman and as a family member of people with disabilities.

I acquired my disability at age 22 when I was in a car accident. I remember the doctors telling me, because my back was in pieces and crushed, that I would spend the rest of my life in bed, operating from bed. I knew I was hurt, but I also knew I wanted to be a full member of society. I wanted to do the best I could. So I continued to try hard and do the best I could with everything I could toward the goal that I had always dreamed of.

Since that time, I have lived my life using a wheelchair, Canadian crutches or walking with a cane and a leg brace. And I am proud of my full life as a disabled woman, as a wife, as a mom and as a citizen.

When I acquired my spinal cord injury, my sister, Tara, was born with Downs Syndrome about the same time. But because of her hard work and the support of our family, Tara graduated from high school, she has taken some college courses. She has supported herself through various jobs and she has bought and insured her own car.

But I am here today to tell you that if and when Tara or I experience employment discrimination because of our disability, we will not be protected by the ADA. As Majority Leader Hoyer said better than I could, the Supreme Court has substituted its own judgment for the judgment of Congress and that is what has created the need for the restoration of the ADA that we are discussing today.

As a consequence of court-made law, we have an absurd Catch-22. If you manage your disability well, you do the best you can in spite of your disability, well then, your civil rights protections are taken away. The courts have taken them away. But if you don't manage your disability well, you have civil rights protections, but you probably won't be able to get a job. That is absurd.

That means because I worked hard in physical therapy and in many other medical things, because I wear a leg brace and walk with a cane, the courts would find me not disabled enough to have civil rights. But if I had given up after my spinal cord injury, or if Tara, my sister with Downs Syndrome, had bought into the low expectations that society had so often given her, if neither of us had tried to live up to what each of our full potential was, we would have been protected if we hadn't tried, if we hadn't done our best.

Now, there are lawyers and policy experts here with me today and they will go into greater detail, but I am here because I think the last message we would want to send to Americans with disabilities, in particular youth with disabilities and returning soldiers, is that the less you do to deal with your condition, the less you do to manage your disabilities, the less you try, the more likely you are to be protected under the civil rights laws. That is horrible policy, and it doesn't make sense.

We shouldn't be punishing people for successfully managing their disabilities, trying to work and trying to pay taxes. ADA Restoration is really about being fair, about fairness.

As a country, we should be focusing on disabled people's abilities, and encouraging people to exceed their full potential. But instead, the courts have been punishing people for trying too hard, for trying to be productive, for wanting to pay taxes. This, again, doesn't make sense.

Please, please help us clear up the mess the courts have made. Help us restore congressional intent. Help us pass the ADA Restoration Act so that the ADA can open wide the doors of opportunity to all of us in America.

Thank you.

[The prepared statement of Ms. Sensenbrenner follows:]

PREPARED STATEMENT OF CHERYL SENSENBRENNER

Chairman Nadler, Ranking Member Franks, and Members of the House Judiciary Subcommittee:

Thank you for the invitation to discuss the topic of ADA Restoration. I am honored to have this opportunity to testify on an issue that affects the ability of literally

millions of people with disabilities to enter and maintain their participation in the American workforce. My name is Cheryl Sensenbrenner, and I am pleased to offer my testimony today as the Board Chair of the American Association of People with Disabilities (AAPD), a national non-profit, non-partisan membership organization promoting the political and economic power of the more than 50 million children and adults with disabilities throughout the U.S. With more than 100,000 members, AAPD is the largest national cross-disability membership organization in the country. In addition to my affiliation with AAPD, I offer my testimony today as a granddaughter, a sister, and a mother of people with disabilities as well as my experience of being a woman with a disability myself.

I offer my testimony today at a most crucial moment for people with disabilities—a time at which U.S. Courts are at complete odds with clear Congressional intent regarding civil rights protections of people with disabilities, and at a time during which you, Congressmen and Congresswomen, can set a landmark civil rights law back on its intended course toward equality for all people.

In 1990, with tremendous bipartisan support, Congress passed the ADA, and President George H.W. Bush signed it into law. During its passage, Congress acknowledged that people with disabilities were extremely disadvantaged socially, economically, vocationally, and educationally—this "political powerlessness" on account of pervasive discrimination, segregation, and exclusion "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . ."[1]

Congress's intention was clear. This great law, the ADA, was meant to stand as the "emancipation proclamation for people with disabilities"[2] against the unfair discrimination that had permeated all aspects of life for people with disabilities for far too long. The law's broad directive to employers, public transportation systems, public accommodations, as well as other program and service providers (including the private sector) was to stop the unfair treatment of people on the basis of their current, past, or perceived disabilities. Once implemented, the ADA was intended to give all people with disabilities the opportunity for independence and full participation and inclusion in society.

And to be sure, in the last 17 years since its passage, we have witnessed an undeniable transformation in our society. Access to public transportation has improved considerably on account of the ADA requirement that all new buses, trains, and accompanying stations be accessible for people with mobility, sensory and other disabilities—there is no question we live in a more accessible society than in 1990 on account of the ADA. Closed-captioning, curb-cuts, power-assisted doors, large print signage—all of these are hallmarks of society post-ADA—of a society more welcoming of and accessible to people with disabilities than in a time past.

I remember that time past. I can remember cold, snide remarks, and demeaning looks and stares that my sister, Tara, who has Down's syndrome, endured nearly every day growing up. And for myself, I vividly recall numerous occasions in which I was subjected to the ignorant comments and low expectations of others after acquiring my spinal cord injury at age 22. I remember once waiting for my father, then Attorney General of Wisconsin, in the lobby of a bank while he conducted some business, and I remember a bank executive staring at me and stating coldly, "People like that belong on park benches out front and not in our lobby."

I remember it so clearly—"People like that," he said. "People like that" are me, my sister, my son, many of my dearest friends, and countless Americans. "People like that" are your loved ones, your friends, or even you—now, or in the future.

You see, the ADA starts with the recognition that disability is a natural part of the human experience. Any person at any time can encounter or acquire a disability. Some people are born with their disabilities, like Tara. Some acquire their disabilities through accident or injury, like I did. Others encounter invisible disabilities through a bout with an illness. Some manifest their disabilities during their school years. Others acquire a disability as they age. And still others acquire disability while putting their lives on the line for our country, as we are reminded daily with each wave of returning soldiers from Iraq and Afghanistan.

Given that all kinds of disability can enter any person's life at any time, often without warning, the more accessible the society we create, and the more intact our system of legal protections, the greater benefit we all reap as a result. The ADA,

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[1] Americans with Disabilities Act, 42 U.S.C.A. § 12101 (1990).

[2] See Remarks of President George Bush at the Signing of the Americans with Disabilities Act, available at http://www.eeoc.gov/ada/bushspeech.html; *See also* Remarks from Senators Orrin G. Hatch and Edward M. Kennedy, at National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper* (October 16, 2002), available at http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm.

then, is a law for all people. It was meant to ensure that whatever the circumstances may be that surround a person's encounter with disability, Americans are never to be treated unfairly, excluded unnecessarily, or relegated to second-class citizenship on the basis of disability without recourse.

Despite all the progress since the passage of the ADA, sadly, we still have a long way to go before the ADA's inclusive vision becomes a reality in America. For instance, I am amazed at how routinely kind and well-educated individuals with whom I interact assume that I acquired my disability after marrying my husband, Congressman F. James Sensenbrenner, by remarking how good it was of him to "stick by me" through that. The fact of the matter is Jim and I fell in love and got married during a time in which I was already disabled. You see, he "got me" in a wheelchair, or at best on Canadian crutches. As for my sister, Tara, through the support of family, she graduated from high school, pursued college coursework, and has gone on to support herself through various jobs, which she has used to finance and insure her car and participate in numerous hobbies. Just this week, she gave me lots of helpful tips about my testimony. And yet despite all her immediately apparent independence, Tara too still routinely runs up against paternalistic words and actions.

Although there are many obstacles yet to be removed for people with disabilities, I believe the largest and most pervasive one to remain is that of attitude. The fears, myths, and stereotypes about people with disabilities from my youth are the same fears, myths, and stereotypes that I still hear of and encounter today, and they are the same fears, myths, and stereotypes that all too routinely result in people being shut out of employment opportunities.

While it is obvious that the ADA has acted as a great equalizer in a variety of contexts, its full potential has yet to be realized. The ADA, as Congress intended in its passage, creates an incentive, arising from a legal obligation, for all citizens to forge a better understanding and more proper perspective for accepting and integrating people with disabilities into all aspects of society, including the workforce.[3] In order for that to occur and for the greatest barrier to all people with disabilities—fears, myths, and stereotypes—to be removed, the law must be applied and enforced as it was intended.

However, this is not happening. Several of my esteemed colleagues on the panel today will discuss the numerous damaging court decisions that have significantly narrowed the intended protections of this law. As a result of these court rulings, the ADA has lost some of its potency as a teacher, and the devastating effects are clear.

The employment rate of people with disabilities has not improved with the passage of the ADA.[4] Two-thirds of individuals with disabilities who do not have a job say they want to have one but cannot find employment.[5] Many of those who do find employment often experience discrimination along the way—in hiring, requesting accommodations, or in unlawful terminations—on account of the same pervasive fears, myths, and stereotypes which characterized the past. What's worse, when these individuals seek their day in court, more than 90% of the time, the courts will side with the employers rather than the individuals who faced discrimination.[6] By undercutting civil rights protections for people with disabilities, the Courts have imposed a dangerous and unacceptable U-turn in the progress people with disabilities have made to date. They have made it legal for employers to say "You are not welcome here" to disabled individuals who want to work, and who want to pay taxes—some of whom have a history of dependency on entitlement programs but are attempting to leave them to become financially independent; some of whom have recently completed higher education following 13 years of inclusive education, only to

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[3] Laura L. Rovner, *Disability, Equality, and Identity,* 55 Ala. L. Rev. 1043 (2004).

[4] Despite many factors contributing to a positive outlook for employment of people with disabilities, including the passage of civil rights laws like the ADA, the employment rate of people with disabilities has not improved significantly, as EEOC Chair Naomi C. Earp pointed out in her testimony during the September 13, 2006 ADA Oversight Hearing held by the House Judiciary Committee, Subcommittee on the Constitution. *See also* Harris, L. & Associates (1998) N.O.D./Harris Survey Program on Participation and Attitudes: Survey of Americans with Disabilities. New York. *See also* L. Harris & Associates, *N.O.D./Harris Survey Program on Participation and Attitudes: Survey of Americans with Disabilities* (2004).

[5] *Career World,* Nov/Dec 2000.

[6] *See* Amy L. Allbright, 2004 *Employment Decisions Under the ADA Title I—Survey Update,* 29 Mental & Physical Disability L. Rep. 513, 513 (July/August 2005) (stating that in 2004, "[o]f the 200 [employment discrimination] decisions that resolved the claim (and have not yet been changed on appeal), 97 percent resulted in employer wins and 3 percent in employee wins").

find that now, after all their hard work, the inclusivity and legal protections are gone.

The ADA was meant to be just like other civil rights laws that address employment discrimination—the sole focus of a legal case was to be on the alleged discrimination of the employer—whether the worker was treated fairly or treated unfairly because of unlawful discrimination. However, as I have come to understand it, unlike other civil rights laws, the Courts have created what I like to call a "double whammy" for people with disabilities who seek to bring a case under the ADA. First they must prove their disabilities through a series of invasive and often highly irrelevant inquiries into the most intimate aspects of their lives. Once they have satisfied this increasingly difficult standard, only then are they given the opportunity to present the facts of discrimination. While a requirement of "proving" one's disability may be reasonable in the context of an entitlement program, it is an unnecessary and harmful step in an employment discrimination context because it is preventing people from ever reaching the issue of whether they were treated unfairly because of their real or perceived disability.

As things currently stand, the effects of the court cases are as absurd as they are devastating. Every day, people with conditions like epilepsy, diabetes, HIV, cancer, hearing loss, depression, and most recently, even people with intellectual disabilities (the new term for what we used to call "mental retardation"), are getting caught in the first "hoop" of the court's inquiry. A multitude of people who manage their disabilities effectively through medication, prosthetics, hearing aids, or other "mitigating measures" are viewed as "too functional"—or not "disabled enough"—to be protected under the ADA.[7] Once stuck in the first hoop, these individuals never have an opportunity to present the facts of blatant employment discrimination that led them to pursue a legal remedy. This means that employers are allowed to make employment decisions on the basis of disability—fire or not hire someone because of their misperceptions or prejudices about disability—and yet the courts find those same individuals "not disabled enough" to be protected under the law! What an absurdity!

As Chairperson of the Board of Directors of AAPD, I often think of our organization's summer Congressional and Information Technology interns with disabilities. I think of how gifted, capable, and sometimes eccentric they are—all so unique and all with such varied disabilities—and I wonder if any of them will be shut out of the law with which Congress intended to protect their civil rights should any of them ever need it.

Even closer to home, I have to wonder what would happen if the many disabled people in my family were ever to encounter and try to challenge employment discrimination under the judge-invented standard that is now the law of the land. Let us assume each of my family members with a disability applied for and was denied a job because of his or her condition. It is often not that blatant, but for purposes of this exercise, let us assume each family member was told the reason they were not considered for the position was because of his or her disability.

My grandmother, Clara Warren, who had type 1 diabetes, would not likely fare well. If voluminous court decisions are any indication, more than likely, she'd get stuck in the first hoop of the "double whammy." Because she responsibly managed her diabetes with medication and diet, the court would tell her that she was not disabled for purposes of the ADA and toss her case out of court. My son, Frank, who, like me, has ADHD, would also likely be told that he was too high-functioning to be protected under the law—never mind that in this hypothetical scenario, they expressly told him that they were not hiring him because of his ADHD. The same would likely be true of such a case pertaining to my spinal cord injury—I would be viewed as getting by "too well" to be considered disabled for purposes of the ADA's protection. After hearing from the Littleton's today, I have less confidence that the outcome would be any different for my sister, Tara, with her intellectual disabilities, who would also likely be viewed as too "high-functioning" to be protected. In each

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[7] *See Sutton v. United Airlines, Inc.,* 527 U.S. 471 (1999) (holding that "mitigating measures"—medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise or any other treatment—must be considered in determining whether an individual has a disability and is protected by the ADA); *see also Murphy v. United Parcel Service, Inc.,* 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555 (1999)). In reaching this conclusion, the Court disregarded explicit statements from Congress that it did not intend mitigating measures to be considered in determining whether a person has a disability: "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 116, 101st Cong., 2d Sess. at 22 (1989); *see also,* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?,* 21 Berkeley J. Emp. & Lab. L. 91, 106 (2000).

of our instances, the facts of the employer's conduct would never even be heard in court.

As if that was not preposterous enough, if we revisit each of my family members in turn and alter only one fact, all of our cases would likely be taken up in court and the facts of discrimination would be heard. If my grandmother had not taken her insulin; if Frank and I had not found ways to manage our ADHD; if I had not committed to physical therapy and rehabilitation following my accident; if Tara had not pursued and relied upon family supports and training. Basically, if all of us played into the historically low expectations for people with disabilities—not done all that we could do to recover from or manage our conditions—we would all stand a much better chance of having our day in court.

I hope this family hypothetical scenario helps illuminate what the lawyers and policy experts can explain in greater depth. It seems to me that the last message we would want to send to Americans with disabilities—particularly youth with disabilities and returning war veterans—is the less you manage your disability, the less you try, the more likely you are to be protected under civil rights laws.

Were the ADA to be applied as are other civil rights laws are, without the first hoop of proving one's disability, the remedial goals of the ADA could be fulfilled. There would still be cases tossed out on the merits, just like lawsuits brought under other civil rights laws, but those cases deserving of judicial consideration would see their day in court, and the ADA would again be allowed to function as it was intended.

My passion in seeing this legislation passed into law is very personal. While I may not be able to speak to all the fine nuances of court decisions, I do know that there is something seriously wrong with the scenario I described. And I know that we have deviated far, far away from what was intended when Senator Bob Dole, who helped to found AAPD and Congressman Tony Coelho, AAPD's current Vice Chair, both key leaders in the passage of the original ADA, have been written out of the very law they helped author.

Please support and help pass the ADA Restoration Act so that the ADA can open wide the doors of opportunity to all Americans.

Thank you for giving me the opportunity to provide my testimony this morning.

Mr. NADLER. Thank you.

Our next witness, Mr. Orr, is recognized for 5 minutes.

TESTIMONY OF STEPHEN C. ORR

Mr. ORR. Good morning. My name is Stephen Orr. I am a licensed pharmacist from Rapid City South Dakota.

Thank you for the opportunity to speak. I would like to provide the highlights of my written testimony.

I have lived with type 1 diabetes since 1986 and take excellent care of my health. Today I use an insulin pump. I treat my condition as recommended by my doctor and I maintain tight blood glucose control. This is incredibly important. It prevents the serious short- and long-term consequences of diabetes, including heart disease, amputation, blindness and death.

In 1997, I was invited to apply for a pharmacy position as manager of Wal-Mart's pharmacy in Chadron, Nebraska. It was a great opportunity. I had lived in there previously and my children and other family members lived there.

I never imagined my diabetes would lead to my being fired from a job. However, that is exactly what happened.

When I was hired by Wal-Mart, my diabetes management regimen included three insulin injections daily and lunch breaks to prevent me from suffering from dangerous low blood glucose levels or hypoglycemia. Prior to being hired, I disclosed to my district manager that I had diabetes and that it would be necessary for regularly scheduled, uninterrupted, half an hour lunch breaks to check my blood glucose and eat. Because I was going to be the only

pharmacist, we agreed to close the pharmacy while I took my lunch break

The pharmacy opened in January 1998. The first 6 weeks went very well. Then the regular management, original management, changed, and I was told that I could no longer close the pharmacy for lunch.

I tried very hard to comply with their request, but was unable to do so and still manage my diabetes. My blood glucose readings plummeted. For example, one day I had a blood glucose reading of 41. The normal reading for a healthy individual is 80 and 120. I was unable to eat until after 2 p.m. As soon as I went to the snack bar, I would be called back to the pharmacy.

This was not a one-time occurrence, and for the next 3 months I experienced repeated dangerously lows on the job, including a blood glucose level of 32.

I told my supervisor how unhealthy it was be for me to continue skipping lunch, but he refused to allow me a routine daily half-hour lunch break. Finally, to protect my safety, I returned to taking lunch breaks. On May 12 I was fired. Let me be clear: when I was fired, I was told flat out that it was because I had diabetes.

After this discrimination I sued Wal-Mart for violating my rights under the ADA. However, the U.S. District Court ruled against me and the U.S. Court of Appeals rejected my appeal. Because of Supreme Court decisions narrowing the Federal law, I was not considered disabled under the Act for the sole reason that my diabetes was under such good control.

Amazingly, the court ignored the fact that when I was working at Wal-Mart, was prevented from properly managing my condition by taking a lunch break.

My case was dismissed, and I never had a chance to try to prove that with a small, reasonable accommodation, I could both perform my job and protect my health. Ironically, Wal-Mart is now allowing the pharmacy to close for lunch.

It is not right that the same employer that fired me because of my diabetes could then claim that I do not meet the definition of disability under the ADA.

I am before you today to say that even with proper diabetes management, the disease affects me every day, every hour of the day. I must constantly try my hardest to maintain a balance between dangerous highs and dangerous low blood glucose levels. The good news is that I have largely been successful in keeping my health safe. Yet, it was because I work so hard to manage my diabetes to make myself a productive employee and citizen that the court found that I didn't merit protection from discrimination.

My case is not unique. Mr. Charles Littleton and his mother, Darbara Littleton, wanted to speak to you today about their experience with the ADA, but unfortunately, they were not unable to meet with you.

The Littleton's have asked if I would submit their written testimony for the record.

Mr. ORR. Again, thank you for the opportunity to speak.

[The prepared statement of Mr. Orr follows:]

PREPARED STATEMENT OF STEPHEN C. ORR

Mr. Chairman and members of the Committee:

Good morning. My name is Stephen Orr and I am a licensed pharmacist from Rapid City South Dakota. Thank you for the opportunity to testify before the Committee today. It is a pleasure to be here speaking to you, Chairman Nadler, Ranking Member Franks and the other distinguished members of this Committee. I appreciate you holding this hearing on restoring the Americans with Disabilities Act (ADA) and for providing me with the opportunity to tell my story of discrimination.

I have lived with type 1 diabetes since 1986 and take excellent care of my health. Having type 1 diabetes means that I must administer insulin multiple times each day in order to survive. As a pharmacist, I provide others with information about how to manage their diabetes throughout the day—and I take that advice very seriously: treating my condition as recommended by my doctors and maintaining tight blood glucose control.

I'd like to explain a little about diabetes so that you know what I mean by "tight blood glucose control." Diabetes is a condition in which the pancreas either does not create any insulin, which is type 1 diabetes, or the body doesn't create enough insulin and/or cells are resistant to insulin, which is type 2 diabetes. Insulin is a hormone that allows glucose or sugar to move from the blood stream into the cells where it is used for energy. Thus, untreated diabetes results in too much glucose in the blood stream. High blood glucose levels, known as hyperglycemia, can be very dangerous in the short term and, in the long-term, it is high blood glucose levels that lead to the many long-term complications of diabetes including blindness, heart disease, kidney disease, and amputation. Thus, I administer insulin to myself in order to lower my blood glucose level. However, while a normal pancreas is able to secrete just the right amount of insulin, it is much harder for a person with diabetes to maintain blood glucose level in a safe range. If I end up with too little insulin in my system I will have hyperglycemia. But, if I end up with too much insulin in my system I will experience a condition call hypoglycemia. Hypoglycemia occurs when blood glucose falls below 70 mg/dL. Low blood glucose levels can be caused by skipping or delaying a meal, more exercise or physical activity than usual, too much insulin, or not following your schedule for taking your insulin or diabetes pills. Mild or moderate hypoglycemia is pretty common for children and adults who take insulin but hypoglycemia can turn severe—leading to seizure or unconsciousness—in very little time. Severe hypoglycemia is a life-threatening condition.

In short, hypoglycemia and hyperglycemia are conditions that happen when insulin and blood glucose are out of balance. In order to manage my diabetes I need to carefully monitor my blood glucose level by self-administering a blood test numerous times a day and adjusting the amount of insulin I administer to take into account the food I eat, the exercise I get, and other factors such as illness. The reason I strive for tight blood glucose control is that research has established that is the way to avoid the devastating long-term complications of diabetes.

In 1997, a Wal-Mart district manager invited me to apply for a position as manager of the company's pharmacy in Chadron, Nebraska. It sounded like a great opportunity. At the time, I was working as a pharmacist in Rapid City, S.D., but had lived in Chadron previously and looked forward to moving the 110 miles back to the town where my grown children resided and countless other family and friends still lived. The job had a great salary and, as I was 47 years old, I expected to retire from there.

Having lived with diabetes for so long, I never imagined that my diabetes could lead to my getting fired. However, that is exactly what happened. In essence I lost my job as a result of trying to protect my health and safety even though none of that interfered with me being a good pharmacist.

At the time that I was hired by Wal-Mart, my diabetes management regimen included, among other things, three insulin injections daily, as well as half-hour lunch breaks to prevent me from suffering from hypoglycemia. Prior to being hired, I disclosed to my district manager that I had diabetes and that I would need to have a regularly scheduled, uninterrupted, lunch break to check my blood glucose level and eat. I only accepted the position after my new employer agreed to the terms by which I could take the care necessary to manage my condition. Based upon this agreement, I accepted the position and moved to Chadron.

On January 3, 1998, I began training in the Rapid City Wal-Mart Pharmacy. By the end of the month, we held the Grand Opening of the Chadron Wal-Mart Supercenter, and the in-store pharmacy formally opened. As the only pharmacist at this location, taking a lunch meant closing the pharmacy during that time period—one of the initially agreed upon terms for my employment. However, a mere six weeks after I started work, the regional management changed. I was told by a new district

manager that I could not close for lunch breaks. I was instructed that I should eat behind the pharmacy if and when things slowed down. I tried to comply with the request, but was unable to do so and safely manage my diabetes. My blood glucose readings plummeted. For example, on March 12, 1998, I had a blood glucose reading of 41 mg/dL. On this particular day, I was unable to eat until after 2pm. When I walked over to the snack bar to pick up lunch I was paged back to the pharmacy. Unfortunately, this was not a one time occurrence and for the next three months I experienced repeated dangerously low hypoglycemia on the job, including a blood glucose level of 32 mg/dL on May 6, 1998.

I spoke to my supervisor in order to explain how unhealthy it would be for me to continue the practice of skipping lunch, but he refused to consider accommodating my medical condition. In order to protect my safety, I was forced to return to my practice of taking half-hour lunches and on May 12, 1998, I was discharged. Let me be clear: when I was fired, I was told flat out that it was because I had diabetes.

After the discrimination I experienced, I brought a case against Wal-Mart Stores, Inc. for violating my rights under the Americans with Disabilities Act. However, the U.S. District Court granted summary judgment against me and the United States Court of Appeals rejected my appeal. The appeals court said that because of Supreme Court decisions narrowing the federal law, I was not considered "disabled" under the Act—for the sole reason that my diabetes is under such good control. The appeals court agreed with my testimony that when my blood glucose level is not within a safe range I suffer from a variety of immediate complications including vision impairment, low energy, lack of concentration and mental awareness, lack of physical strength and coordination, slurred speech, difficulties typing and reading, and slowed performance. Yet, the court said that I could not rely on evidence of how I was when my blood glucose level was not within a safe range. Rather, the court said:

> [N]either the district court nor we can consider what would or could occur if Orr failed to treat his diabetes or how his diabetes might develop in the future. Rather, [the Supreme Court decision in] Sutton [v. United Airlines] requires that we examine Orr's present condition with reference to the mitigating measure taken, i.e., insulin injections and diet, and the actual consequences which followed.[1]

Amazingly, the court ignored the fact that when I was working at Wal-Mart, I was prevented from properly managing my condition by my employer. That is, Wal-Mart took away the means I had to manage my disease, I became ill, and then my case was thrown out of court because the judges insisted upon viewing me as I would be if I had been allowed to properly manage my disease.

My case was dismissed and I never had a chance to try to prove that, with a very small reasonable accommodation, I would have been able to both fully perform my job and protect my health and safety. Ironically, as a corporate policy, Wal-Mart is now allowing the pharmacy in Chadron to be closed for a 30 minute period, although there is still only one pharmacist on duty.

I find it tremendously unfair that the same employer that fired me because of my diabetes could then successfully claim that I did not meet the definition of disability under the ADA. I ask that you amend the law so that the focus of cases like mine is on whether the individual can do the job, rather than lawsuits about the private details of an individual's medical condition. I stand before you to say that, even with proper diabetes management, this disease affects me every day, every hour of my life. I must constantly try my hardest to maintain a balance between dangerously high and dangerously low blood glucose levels. Diabetes affects everything I do from eating to physical activity. The good news is that I have largely been successful in keeping myself safe and healthy. Yet, it was because I work so hard to manage my diabetes to make myself a productive employee and citizen that the court found that I didn't merit protection from discrimination.

I wish my case was unique but it is not. Mr. Charles Littleton and his mother, Darbara Littleton, had hoped to speak to you today about their experience with the ADA, but unfortunately, they were not able to make it. Their story is yet another example of a person who *wanted* to do the job and who *could* do the job with a reasonable accommodation, but who was refused an accommodation and then was not protected by the ADA. Charles and Darbara have asked me if I would submit their written testimony on their behalf, and so I ask that their testimony be made part of the record of this hearing.

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[1] *Orr v. Wal-Mart Stores,* 297 F.3d 720, 724 (8th Cir. 2002)

Too many people have had their ADA claims dismissed because they were found by the courts not to be sufficiently disabled under the courts' misguided interpretation of the definition of disability under the ADA. Congress must restore the ADA to what it was intended to be—a comprehensive mandate to protect all Americans from discrimination based on disability.

Again, thank you for the opportunity to speak before you today.

Mr. NADLER. I thank the witness. Those statements will be accepted without objection.

[The prepared statement of Charles and Darbara Littleton follows:]

Testimony of Charles Irvin Littleton, Jr.
Before the Subcommittee on the Constitution, Civil Rights, and
Civil Liberties on H.R. 3195, the "ADA Restoration Act of 2007"
October 4, 2007

I am happy to be here for myself and for all the other people who need help under the ADA.

Thank you, mom, for telling my story, and thank you, David, for helping in court.

For my whole life, I have tried to do my best. I went to school and I also have worked. Sometimes I am not treated fairly. So I am glad that there are laws to help people like me.

I just want to tell you how much I wanted to work at the Wal-Mart. I spent a lot of time trying to get that job and I know I could have done good work there.

I am very glad that you are paying attention to my story.
Thank you very much.

Testimony of Darbara Littleton
Before the Subcommittee on the Constitution, Civil Rights, and
Civil Liberties on H.R. 3195, the "ADA Restoration Act of 2007"
October 4, 2007

Good morning. My name is Darbara Littleton, and this is my son, Charles Littleton, Jr. I also have another wonderful son, Jarvis, who wears hearing aids and uses sign language. We live in Birmingham, Alabama. We are here with our attorney, David Ferleger.

I have raised Charles for these 31 years. I helped him get through school and get his first job. Charles lives with me and I am happy to say that he is working now as a cleaner in an office building.

When things have happened in Charles' life that are not fair, I have fought for him. I even went to court to stand up for him when some people treated him unfairly a few years ago.

I am here today to tell you about what happened to Charles and why I thought it was wrong.

First, let me tell you a bit about Charles. He loves video games and TV and movies. He can cook instant oatmeal, bacon and get cereal. He likes spending time by himself.

But you should also know that Charles needs to get to know people for him to feel comfortable interacting with them. He is shy and he doesn't speak much in new situations.

When Charles was a little boy, he was having difficulty in school. The public school tested him. They told me that he was labeled as "mentally retarded" and would be placed in special education. Despite his difficulties, Charles has always wanted to do so much. I was so proud of him going to school and earning a high school certificate in a special education program. Although he is "disabled" in some ways, Charles and I prefer to concentrate on his abilities.

Charles has always wanted to work. When he was younger, he worked as a bagger and a cart-pusher at grocery stores. He really enjoyed those jobs. He was proud of his work.

For a long time, Charles wanted to get a job at the Wal-Mart in Leeds, Alabama. He called the head of personnel, Ms. Marlene

Barcanic, every week to find out if they had job openings. His job coach at the Alabama Independent Living Center, Ms. Carolyn Agee, had been working with Charles to find him jobs. Ms Agee also spoke to Ms. Marlene about Charles.

Ms. Agee said that Ms. Marlene knew Charles had a disability and, because of that, Ms. Agee could be with him during the interview. For a successful interview, he needed her support.

After these discussions, Ms. Agee called Charles and told him that he had an interview for a cart-pushing job. I drove Charles to the Wal-Mart. He met Ms. Agee and the two of them went in for the interview. I waited in the car.

When Charles came back out he was very sad. He said he didn't know if he got the job. He told me that Ms. Agee wasn't allowed to be in the interview with him. Ms. Marlene wasn't there either. So Wal-Mart turned him down.

I know that Charles could have done that job at Wal-Mart, but he did not even get a real chance.

Charles lost a lot of self-confidence that day. It really broke my heart to see him so sad. I just knew that it was wrong for them not to let Ms. Agee be there during the interview.

Charles and I felt that what happened to him was unfair. We decided to challenge it. We went to the EEOC, which told us they could not take the case, but that we could file a lawsuit without them. So I took the EEOC report to the court and asked for a lawyer.

Our first lawyer believed we would win our case. It was so obvious to us that Charles should be protected by the Americans with Disabilities Act.

But we lost our case, because the first court and the court of appeals decided that Charles wasn't covered by the ADA. Then, with the help of Mr. Ferleger, we took our case to the United States Supreme Court which said "no" to us this week.

It has been a long, hard journey through the courts. This sort of thing shouldn't have happened to Charles, and it shouldn't happen to anyone else, either. The law should protect people like

my son. We cannot believe that the ADA right now doesn't protect someone like Charles.

Now Charles is going to tell you a little bit about what happened to him. Thank you for inviting us both to speak today. It has been an honor to tell Charles's story so that we can help thousands of other people like him get the protection they need.

Mr. NADLER. Mr. Collins is recognized for 5 minutes.

TESTIMONY OF MICHAEL C. COLLINS, EXECUTIVE DIRECTOR, NATIONAL COUNCIL ON DISABILITY

Mr. COLLINS. Chairman Nadler, Ranking Member Franks and Members of the House Judiciary Subcommittee, the National Council on Disability would like to thank the Committee for this opportunity to provide testimony on the Americans with Disabilities Act and the ADA Restoration Act.

I have been asked to share some information NCD has learned about the experiences of people with disabilities as a result of Supreme Court interpretations on the definition of disability under the ADA and to explain why it is the unanimous position of our 15-member council, most who have disabilities, or whose lives are impacted by disability on a daily basis, that this Restoration Act is timely and necessary.

NCD first proposed the concept of the ADA in 1986 and proposed language for the new law soon thereafter. NCD monitors the impact, implementation and effectiveness of the ADA and other disability-related laws and programs on an ongoing basis. One of NCD's monitoring activities has been to analyze the Supreme Court cases interpreting the ADA.

From 2002 to 2004, NCD produced a series of 19 policy briefs analyzing these Supreme Court decisions and their ramifications on subsequent Federal court cases. This work culminated in a comprehensive report called "Righting the ADA," which I have with me, in which NCD proposed language for an ADA Restoration Act.

Congress defined disability in the ADA to encompass both actual and perceived limitations and limitations imposed by society. It was intended to provide comprehensive protections for anyone who had been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived.

The Supreme Court has issued several decisions relating to the definition of disability under the ADA, so altering it that the majority of people with disabilities would have no Federal legal recourse in the event of discrimination, particularly in instances of employment discrimination, as Mr. Orr has expressed.

In June 1999, the Supreme Court decided *Sutton v. United Airlines,* a case involving pilots needing corrective lenses, and *Murphy v. United Parcel Service,* a case involving a man with high blood pressure. In both cases, the Court held that in determining whether an individual is substantially limited in a major life activity, courts may consider only the limitations of an individual that persists after taking into account mitigating measures.

On the same day in 1999, the Court decided *Albertson's v. Kirkingburg,* a case involving a man who was blind in one eye. The Court held in *Krukenberg* that a mere difference in how a person performs a major life activity does not make the limitation substantial. How an individual has learned to compensate for the impairment, including measures undertaken whether consciously or not with the body's own systems also must be taken into account.

The results of these decisions is that people who Congress clearly intended to be covered by the ADA, such as people with epilepsy,

diabetes, depression and hearing loss, are now being denied employment and refused reasonable accommodations because of the disability and courts refuse to hear their cases, regardless of how egregious their employers actions.

These decisions have also resulted in courts now making elaborate inquiries into all aspects of the personal lives of certain plaintiffs in order to determine whether and to what extent mitigating measures actually alleviate the effects of the disability.

The Supreme Court has also changed the meaning of substantial limitation of a major life activity in ways that screen out even more people with disabilities. In *Toyota v. Williams,* the Court changed "substantially limits" to mean "prevents or severely restricts" and decided that to be substantially limited in a major life activity a person must be substantially limited in an activity "of central importance to most people's daily lives."

This has led to extensive questioning by courts about individual's ability to brush his or her teeth, bathe, dress, stand, sit, lift, eat, sleep and interact with others. It has led to contradictory rulings by Federal courts about whether activities such as communicating, driving, gardening, crawling, jumping, learning, shopping in the mall, performing housework and even working and living are major life activities.

In hundreds of cases of alleged disability-based discrimination, people with disabilities have had to spend their resources litigating such issues often with the question of whether disability discrimination has occurred going unaddressed.

I receive several inquiries each month from highly qualified and highly motivated jobseekers with disabilities. In many cases, they express frustration about the doors to employment that are shut or slammed in their faces. An email I received just yesterday was fairly typical. A prospective employer had actually Googled the applicant and discovered an article profiling the candidate in a disability publication. The employer placed a call to advise that the office was on the second floor of a building with no elevator. They could not accommodate an employee in a wheelchair, so the applicants name was being removed from consideration for the job.

This is extremely frustrating as the applicant did not use a scooter, a wheelchair or other mobility device, but a false perception by the employer that this person could not access the job site actually could not be challenged under the current court interpretations of the ADA.

NCD is also concerned about the impact of the developments in the ADA case law on veterans with disabilities. Many of our veterans require the use of those mitigating measures the court speaks of, including medication, orthotics and assistive technology. The phenomenon is due in part to advances in assistive technology that make it possible for people with disabilities to perform a wide range of jobs and these members have decided to either reenter the military or enter the civilian workforce shortly after they return to the States.

We must restore the ADA to ensure that our society welcomes home our veterans with disabilities and all Americans deserve that consideration. H.R. 3195 simply confirms the congressional intent in the ADA to provide that protection, whether real or perceived.

In conclusion, the ADA has been transformed into special protections for a select few. NCD urges Congress to act quickly to reinstate the scope of protection Congress initially provided in the ADA.

Thank you.

[The prepared statement of Mr. Collins follows:]

PREPARED STATEMENT OF MICHAEL C. COLLINS

Testimony Presented to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the U.S. House of Representatives Committee on the Judiciary during the Hearing on H.R. 3195, the "ADA Restoration Act of 2007"

Michael C. Collins
Executive Director
National Council on Disability
October 4, 2007

I would like to thank the Committee for this opportunity to provide testimony on behalf of the National Council on Disability (NCD) in support of the Americans with Disabilities Act (ADA) Restoration Act. Our Chairman, John Vaughn, was unable to join us today but asked me to share some information the National Council on Disability (NCD) has learned about the impact on people with disabilities resulting from a series of Supreme Court interpretations of the definition of "disability" under the ADA. Hopefully my comments will emphasize the many reasons why the member s of our Council voted unanimously to support the passage of the ADA Restoration Act.

Introduction

NCD is an independent federal agency, composed of 15 members appointed by the President and confirmed by the Senate. NCD's purpose is to promote policies and practices that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability, and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and integration into all aspects of society.

NCD's duties under its authorizing statute include gathering information about the implementation, effectiveness, and impact of the ADA.[1] In keeping with this requirement, one of NCD's monitoring activities has been to analyze the Supreme Court cases interpreting the ADA. From 2002 to 2004, NCD produced a series of 19 policy briefs analyzing the Supreme Court's ADA cases[2]and their ramifications on subsequent federal court cases. This work culminated in a comprehensive report, *Righting the ADA*[3], in which NCD proposed language for an ADA Restoration Act.

The Supreme Court has issued several decisions relating to the definition of "disability" under the ADA. These decisions have narrowed the definition of "disability," restricting substantially the number of individuals entitled to protection under the law. NCD has reviewed the history and evolution of the definition of "disability," analyzed the Congressional intent with respect to coverage, reviewed the effect of EEOC regulations and guidance on the definition, and examined the Supreme Court decisions involving the definition of "disability."[4] NCD concludes that the Supreme Court's interpretation of the definition of "disability" under the

ADA has so altered the ADA that the majority of people with disabilities now would have no federal legal recourse in the event of discrimination, particularly in instances of employment discrimination. Passage of the ADA Restoration Act is urgently needed to restore the ADA's protections against disability-based discrimination for all Americans.

NCD's Role in the Passage of the ADA

NCD played a key role in the inception of the ADA.[5] NCD first proposed the concept for the ADA, federal legislation to address the discrimination experienced by people with disabilities, in its 1986 publication, *Toward Independence: An Assessment of Programs and Laws Affecting Persons with Disabilities—With Legislative Recommendations*.[6] The first published draft of the law was included in NCD's report, *On the Threshold of Independence*[7] in early 1988. The ADA was then introduced in the House and the Senate in April of that year.

While the bill was introduced too late in the congressional session to be voted on by both chambers, NCD continued to play a pivotal role in the passage of the bill. NCD members continued to meet with various members of the disability community. NCD released another report, *Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities*, which evaluated poll results and made recommendations based on the findings.

On Capitol Hill, Congressman Major Owens created the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities, which researched the extent of discrimination. The Task Force was chaired by former NCD Vice Chairperson Justin Dart, and its coordinator was former NCD Executive Director Lex Frieden. Revisions were made to the initial draft, with the assistance of national disability consumer organizations. Strong bipartisan support for the ADA had developed by the time Congress returned for the next session. Both the House and Senate passed similar bills and, in mid-July, both chambers passed the final version of the ADA, which was signed into law by President George H. W. Bush on July 26, 1990.

Definition of "Disability" in the ADA

Congress modeled the definition of disability in the ADA on Section 504 of the Rehabilitation Act, which had been construed to encompass both actual and perceived limitations, and limitations imposed by society. The definition adopted by Congress and the legislative history of the ADA demonstrate the intention to create comprehensive coverage under the statute. This definition of "disability" was conceived as a broad element that would extend statutory protection to anyone who had been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived.

The Supreme Court's decision in *School Board of Nassau County v. Arline*[8] was the leading legal precedent on the definition of disability when Congress was considering the ADA. Several Committee reports regarding the ADA expressly relied on the *Arline* ruling in discussing the definition of disability. In *Arline*, the Court took an expansive and nontechnical view of the definition of "disability." The Court found that Ms. Arline's history of hospitalization for infectious tuberculosis was "more than sufficient" to establish that she had "a record of" a disability under Section 504 of the Rehabilitation Act.[9] The Court made this ruling even though her discharge from her job was not because of her hospitalization.

The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted that, in establishing the new definition of disability in 1974, Congress had expanded the definition "so as to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"[10]

To ensure that the definition of disability and other provisions of the ADA would not receive restrictive interpretations, Congress included a requirement that "nothing" in the ADA was to "be construed to apply a lesser standard" than is applied under the relevant sections of the Rehabilitation Act, including Section 504.[11] At the time of the ADA's enactment, it was not contemplated that disability discrimination cases would come to be more about determining the extent of someone's disability, rather than about whether discrimination, in fact, occurred.[12]

For several years after the ADA was signed into law, the pattern of broad and inclusive interpretation of the definition of disability, established under Section 504, continued under the ADA. In 1996, a federal district court declared that "it is the rare case when the matter of whether an individual has a disability is even disputed."[13] As some lower courts, however, began to take restrictive views of the concept of disability, defendants took note, and disability began to be contested in more and more cases.

The Supreme Court Changes the ADA Definition of Disability

Beginning with its decision in *Sutton v. United Airlines* in 1999, the U.S. Supreme Court started to turn its back on the broad interpretation of disability endorsed by the Court in the *Arline* decision.[14] By the time of the *Toyota v. Williams* decision in 2002, the Court was espousing the view that the definition should be "interpreted strictly to create a demanding standard for qualifying as disabled."[15] This position is directly contrary to what the Congress and the President intended when they enacted the ADA.

A narrow interpretation of the term "disability" in the ADA excludes many people whom Congress intended to protect. Recognizing that discrimination on the basis of disability takes place in various ways against people with various types of disabilities, Congress had adopted a time-tested and inclusive, three-prong definition of "disability" in the ADA. Congress was entitled to expect that this definition would be interpreted expansively because the courts and regulations had interpreted the identical definition in the Rehabilitation Act broadly. NCD views as "draconian" and "erroneous" the "stereotypical view of disability" that would extend ADA protection only to those who "are so severely restricted that they are unable to meet the essential demands of daily life."[16]

In June of 1999, the Supreme Court decided *Sutton v. United Airlines*,[17] a case involving pilots needing corrective lenses, and *Murphy v. United Parcel Service*,[18] a case involving a man with high blood pressure. In both cases, the Court held that, in determining whether an individual is substantially limited in a major life activity, courts may consider only the limitations of an individual that persist after taking into account mitigating measures, e.g., medication or auxiliary aids and services and any negative side effects the mitigating measures may cause.

On the same day in 1999, the Supreme Court decided *Albertson's v. Kirkingburg*,[19] a case involving a man blind in one eye. The Court held in *Kirkingburg* that a "mere difference" in how a person performs a major life activity does not make the limitation substantial; how an individual has learned to compensate for the impairment, including "measures undertaken, whether consciously or not, with the body's own systems," also must be taken into account.[20] These three cases, *Sutton, Murphy* and *Kirkingburg* are often referred to as the "*Sutton* trilogy."

The result of these decisions is that people who Congress clearly intended to be covered by the ADA,[21] such as people with epilepsy,[22] diabetes,[23] depression,[24] and hearing loss,[25] are now being denied employment and refused reasonable accommodations because of their disability or the mitigating measures they use, and courts refuse to hear their cases, regardless of how egregious their employers' actions.

These decisions have resulted in courts now making elaborate inquiries into all aspects of the personal lives of certain plaintiffs in order to determine whether, and to what extent, mitigating measures actually alleviate the effects of the disability – none of which is relevant to the question of whether discrimination occurred. Such inquisitions about the extent of people's disabilities is also inconsistent with other provisions of the ADA that sharply restrict the use of inquiries about the nature and extent of disabling conditions and of medical information about an individual's limitations.[26]

When elaborate inquiries are called for by the ADA, they should be about the individual's abilities – not his or her disabilities.[27] Not only are elaborate inquiries

into the extent of a person's disability demeaning and extremely costly in terms of litigation resources, they miss the point. It does not matter if medication stabilizes a person's blood sugar if the employer harbors an irrational fear that it will not do so, and terminates the employee. It does not matter how effective someone's hearing aids are if an employer refuses to hire him because the employer believes his insurance rates will increase if he hires a person with a hearing impairment. It does not matter if working the day shift would eliminate someone's risk of seizures if the employer refuses the employee's request to switch from the night shift to the day shift.

By focusing on how well mitigating measures alleviate the effects of a disability, the Supreme Court has denied discrimination protection to people who are likely to be capable of doing the job. It is a rare plaintiff who is able to successfully challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.

The Supreme Court has also changed the meaning of "substantial limitation of a major life activity" in ways that screen out even more people with disabilities that Congress intended to protect. Closely tracking the Rehabilitation Act, the first prong of the ADA definition of disability provides that a condition constitutes a disability if it "substantially limits one or more of the major life activities of such individual."[28] In *Toyota v. Williams*, the Court changed substantially limits to mean "prevents or severely restricts."[29]

In the *Williams* case, the Court also decided that to be substantially limited in a major life activity, a person must be substantially limited in an activity "of central importance to most people's daily lives," and held that "substantially limited in a major life activity" must be "interpreted strictly to create a demanding standard for qualifying as disabled."[30] The phrase "of central importance to most people's daily lives" has led to extensive questioning about an individual's ability to brush his or her teeth, bathe, dress, stand, sit, lift, eat, sleep, and interact with others.[31] It has led to contradictory rulings by federal courts about whether activities such as communicating, driving, gardening, crawling, jumping, learning, shopping in the mall, performing house work, and even working and living are "major life activities."[32] In hundreds of cases of alleged disability-based discrimination, people with disabilities have had to spend their resources litigating such issues, often with the question of whether disability-discrimination occurred never being addressed.

The cases discussed here represent only a portion of the problematic issues raised by a string of decisions by the Supreme Court which have significantly diminished the civil rights of people with disabilities.[33] The ADA Restoration Act is needed to return the focus to examination of the relevant facts of the case when disability discrimination is alleged. Can the person with a disability perform the essential functions of the job, with reasonable accommodations, if necessary? Would the reasonable accommodation pose an undue hardship on

the employer? Would the person's mental or physical impairment pose a safety risk to others that could not be eliminated by a reasonable accommodation? Did the employer discriminate against the employee on the basis of a real or perceived disability?

As NCD declared in its *Righting the ADA* report:

> The Court's position that the definition of disability is to be construed narrowly represents a sharp break from traditional law and expectations. It ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a comprehensive prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability. It also flies in the face of an established legal tradition of construing civil rights legislation broadly. Congress knowingly chose a definition of disability that to that time had been interpreted broadly in regulations and the courts; it was entitled to expect the definition would continue to receive a generous reading.
>
> In crafting the ADA, Congress did not treat nondiscrimination as something special that can be spread too thin by granting it to too many people. Unlike disability benefits programs, such as Social Security Income (SSI) and Social Security Disability Insurance (SSDI), which are predicated on identifying a limited group of eligible persons to receive special benefits or services that other citizens are not entitled to obtain, and for which the courts have sought to guard access jealously, the ADA is premised on fairness and equality, which should be generally available and expected in American society. The Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.[34]

Given the extensive congressional record regarding findings of discrimination against many types of disabilities and the broad coverage of the ensuing ADA regulations, the general understanding following enactment of the ADA was that anyone experiencing disability-related discrimination had a remedy in court. People with disabilities of all types presume they are covered by the ADA when many of them now are not.

Restoration, Not Expansion

The ADA was intended to apply to every person who experiences discrimination on the basis of disability; protection from discrimination is not a special service reserved for a select few. The law was crafted to extend protection even to people who are not actually limited by their conditions but who experience adverse treatment based on fear, stereotyping, and stigmatization.

The ADA Restoration Act supports the purpose of the ADA, to prohibit discrimination, by removing the obstacle of forcing a person to prove that he or she has a sufficiently severe impairment to justify protection under the law. The language in the ADA Restoration Act still requires a plaintiff to show that discrimination occurred based on his or her real or perceived physical or mental impairment to successfully bring a claim under the ADA. The ADA still protects only those who can prove discrimination based on that impairment, and, in addition, in the employment context, individuals who can demonstrate that they are qualified to perform the job.

Congress balanced the interests at stake when it passed the ADA 17 years ago. Congress included, for instance, elements intended to protect the interests of small businesses, and these elements remain in place under the ADA Restoration Act, including: the exemption for small employers, the undue hardship limitation, the readily achievable limit on barrier removal in existing public accommodations, the undue burden limitation regarding auxiliary aids and services, and the elevator exception for small buildings, among others.[35] The bill currently before Congress restores the original intent of a carefully crafted law.

Veterans with Disabilities

NCD is particularly concerned about the impact of the developments in the ADA case law on veterans with disabilities. Service members returning from the current conflict in Iraq and Afghanistan are experiencing a very high incidence of disabilities, including post-traumatic stress disorder and traumatic brain injury.[36] Many of our veterans with disabilities will require the use of mitigating measures such as medication, orthotics, and assistive technology. It is imperative that Congress restore the ADA so that these men and women will not be subjected to discrimination as a result of disabilities they incurred while serving our country.

NCD hosted a veterans' program at its quarterly meeting held in San Diego, California on January 29 - 31, 2007. The purpose of the program was for Council members to learn from veterans with disabilities, particularly service members returning from the current conflicts, about the programs available to assist them as they transition to life with a disability, and whether those programs are meeting their needs. NCD learned that veterans with disabilities returning from the current conflicts differ from those in prior wars in that many are electing to remain in the military or enter the civilian workforce after rehabilitation. This phenomenon is due, in part, to advances in assistive technology that make it possible for people with disabilities to perform a wide range of jobs and, in part, to progressing attitudes, as many more people have experienced first-hand the skills and potential of people with disabilities.

We must ensure that our society welcomes home our veterans with disabilities, and that those who can perform essential job functions are not prevented from doing so solely on the basis of their disability or the mitigating measures they use. The rights of veterans with disabilities to be free from discrimination cannot

be ensured without restoration of the ADA.

Conclusion

The Americans with Disabilities Act was designed to prohibit disability-based discrimination against all Americans, whether or not they actually have a disability. The Supreme Court has issued many decisions interpreting the ADA since its enactment, limiting the scope of the ADA and transforming it into a "special" protection for a select few. The result is that disability discrimination now occurs with impunity, particularly in the workplace. Unless and until Congress takes action to correct the course of the ADA, most Americans are no longer protected from disability-based discrimination. NCD urges Congress to act quickly to reinstate the scope of protection Congress initially provided in the ADA.

Respectfully submitted,

Michael C. Collins
Executive Director

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[1] For a list of NCD's publications on the ADA, see Attachment 1.
[2] See NCD's *Policy Brief Series: Righting the ADA at* http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.
[3] National Council on Disability, *Righting the ADA* (2004), available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.
[4] *See* National Council on Disability, *Americans with Disabilities Act Policy Brief Series: Righting the ADA – No. 6, Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity*, (2003), *at* http://www.ncd.gov/newsroom/publication/extentoflimitations.html.
[5] For additional information, see NCD's 1997 publication, *Equality of Opportunity: the Making of the Americans with Disabilities Act*, http://www.ncd.gov/newsroom/publications/1997/equality.htm. NCD's role with respect to the ADA is also described in the 2004 report *National Council on Disability: 20 Years of Independence,* http://www.ncd.gov/newsroom/publications/2004/publications.htm.
[6] National Council on Disability, *Toward Independence: An Assessment of Programs and Laws Affecting Persons with Disabilities—With Legislative Recommendations* (1986), *available at* http://www.ncd.gov/newsroom/publications/1986/toward.htm.
[7] National Council on Disability, *On the Threshold of Independence* (1988), available at http://www.ncd.gov/newsroom/publications/1988/threshold.htm.
[8] *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).
[9] *Id.* at 281.
[10] *Id.* at 279.

[11] 42 U.S.C. § 12201(a).
[12] For additional information, see NCD's policy papers that discuss the care with which the ADA definition of disability was selected and the breadth of that definition, *A Carefully Constructed Law* and *Broad or Narrow Construction of the ADA*, papers No. 2 and No. 4, respectively, of NCD's *Policy Brief Series: Righting the ADA at* http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.
[13] *Morrow v. City of Jacksonville*, 941 F. Supp. 816, 823 n. 3 (E.D.Ark. 1996).
[14] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).
[15] *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197-98 (2002).
[16] National Council on Disability, *National Council on Disability: 20 Years of Independence (2004), available at* http://www.ncd.gov/newsroom/publications/2004/twentyyears.htm.
[17] *Sutton,* 527 U.S. 471 (1999).
[18] *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).
[19] *Albertson's Inc. v. Kirkingburg,* 527 U.S. 555 (1999).
[20] *Id.* at 564-67.
[21] *See* S. Rep. No. 116, 101st Cong., Ist Sess. 23 (1989); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 52 (1990).
[22] *See Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999).
[23] *See Nordwall v. Sears, Roebuck & Co.,* 46 Fed. App. 364, 2002 WL 31027956 (7th Cir. 2002) (unpublished).
[24] *See Spades v. City of Walnut Ridge*, 186 F.3d 897, 900 (8th Cir. 1999).
[25] *See Martell v. Sparrows Point Scrap Processing*, 214 F. Supp. 2d 527 (MD. 2002).
[26] 42 U.S.C. 12112(d)(2)(A) ("Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."); 42 U.S.C. 12112(d)(2)(B) ("A covered entity may make inquiries into the ability of an employee to perform job-related functions."); 42 U.S.C. 12112(d)(4)(A) ("A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.").
[27] *Id.*
[28] 42 U.S.C. § 12102(2)(A).
[29] *Toyota*, 534 U.S. 184 (2002).
[30] *Id.*
[31] National Council on Disability, *Policy Brief Series: Righting the ADA, No. 13, The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities* (2003), *at* http://www.ncd.gov/newsroom/publications/2003/limitation.htm.
[32] *Id.*
[33] *See* NCD, *Righting the ADA* (2004), *available at* http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.

More detailed descriptions of the specific issues and problems are presented in the *Righting the ADA* series of policy briefs published on NCD's Web site at www.ncd.gov/newsroom/publications/2003/policybrief.htm.

[34] National Council on Disability, *Righting the ADA* (2004) at 11, *available at* http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm#IIA.

[35] For more information, see NCD statement on the subject of the Notification Act at http://www.ncd.gov/newsroom/news/2003/r03-408.htm.

[36] According to the 2004 Report of the Special Committee on Post-Traumatic Stress Disorder, established by Congress in 1984 to monitor this problem, forty percent of casualties returning from Iraq and Afghanistan to Walter Reed Army Medical Center reported symptoms consistent with PTSD.

Mr. NADLER. Thank you.
Mr. Lorber is recognized is for 5 minutes.

TESTIMONY OF LAWRENCE Z. LORBER,
U.S. CHAMBER OF COMMERCE

Mr. LORBER. Thank you, Mr. Chairman, Ranking Member Franks.

In addition to the introduction that the Chairman kindly gave about me, I do want to note that in 1975 I was privileged to be appointed and head the Office of Federal Contract Compliance Programs at a time when the 1974 amendments to the Rehabilitation Act were being considered. And we issued the first regulations under section 503 dealing with what was then called handicaps for employment.

That was at a time when we did not have the benefit of the experience that the Congress had in 1989 and 1990, and we had to create, in many respects, concepts that were applicable then to employment and, I think as it turned out, with the subsequent issuance of the 504 regulations, applicable today.

With all due respect, H.R. 3195 is not a Restoration Act. It is an attempt to pass, in 2007, a law that the Congress examined and rejected in 1988. Instead, the Congress in 1989 and 1990 addressed the issue of discrimination against handicapped individuals, disabled individuals, in many aspects looked to the experience under section 504, looked to the long experience under the other laws, State and Federal, affecting disabled, and opted to choose a statutory scheme which recognized that those who are disabled, truly disabled, whose disability affected a major life activity, would then go on to require employers for title 1, for the employment section, to work interactively with those individuals and hopefully come up with accommodations to enable those individuals to meet their full and undoubted capacities and contribute to society.

The bill before you today does none of that. Rather, what it does is change in a wholesale method the definition of who would be covered under the law. It substitutes for disability the notion of impairment. It takes away the notion and the concept that there are indeed disabled Americans who are deserving of protections and should be able to work. And instead substitutes for that every American, every employee, every applicant for employment who might have a condition, be it permanent or transient, be it disabling or annoying, be it cured or subject to cure, and require employers to afford to every one of those individuals the specific types of relief and obligations unique to the ADA which they are now required to apply to those with disabilities.

They would have to engage in an interactive process. They would have to determine what specific accommodations an individual such as that could need to perform the job. One could only imagine the type of accommodations which would be required to somebody who has a cold. One could imagine the type of accommodations to somebody who, for example, has lost their eyeglasses, misplaced them, and would come in 45 minutes late because they couldn't find their eyeglasses. These are not hypothetical issues. These are real issues which would be caused by this act if it were passed.

In addition, I would point out that the ADA is unique in many respects. It does require individualized assessments of the ability of an individual to do their job, unlike every other employment discrimination law, which takes the status of the individual and determines if that status led to, in the legal term causation, to deal with that individual in a way that was improper. Here, under the ADA, there are affirmative obligations for employers to engage in the process I described so that the employees or the applicants may be given a fair and appropriate opportunity to be considered for employment and to achieve employment.

Instead, what we are talking about is turning this act, the Americans with Disabilities Act, into the Universal Employment Act of 2007, affording every individual the opportunity to bring a lawsuit, to challenge an employment decision and simply connect it in some manner, whether direct or indirect, to their condition.

I would like to briefly point out one other aspect of this proposed legislation which is indeed remarkable. In every employment discrimination law, an individual has to be qualified to be considered for the job. Under the ADA you are either qualified with or without an accomodation as appropriate under the statutory scheme. The legislation before you changes that. It takes away the need for the individual to show they are qualified and rather puts on the employer an affirmative defense after the litigation is commenced, after discovery is undertaken, to try to show that the individual is or is not qualified, approving the negative. In legal parlance, it would be an almost impossible burden. And what that would do is cause all of these cases, all of these issues, to go to litigation.

I would like to briefly point out that we have been told that *Sutton* and its progeny have ended the rights of the disabled. Well, in 1998 the EOC received some 17,088 claims. They found cause or determinations of 6.2 percent of those claims. In 2004, after *Sutton*, after *Williams*, they received approximately 15,500 claims and there were positive cause determinations of 5.5 percent of those. Hardly any indication that *Sutton* or other cases resulted in the diminution or the ending of the rights of the disabled.

The Chamber of Commerce recognizes and suggests that there is no difference in the interest of the employment community and the disabled individuals that the ADA is meant to protect. The Chamber of Commerce also recognizes that any statutory scheme deserves reexamination after 17 years of experience. However, it rejects the notion that the long experience under the Rehabilitation Act of 1973 and the ADA be tossed aside and be replaced by a litigation regime not focused on the universally lauded goal of full inclusion of qualified individuals with disabilities into the mainstream of American life, but rather to place 15,000 or 17,000 more cases into the courts so that we can, the lawyers among us who perhaps do well under this act, but those who the act were meant to protect simply wait at the end of a very long line.

Thank you very much.

[The prepared statement of Mr. Lorber follows:]

PREPARED STATEMENT OF LAWRENCE Z. LORBER

Testimony of

Lawrence Z. Lorber*

Before the United States House of Representatives

Committee on the Judiciary

Subcommittee on Constitution, Civil Rights and Civil Liberties

Hearing on H.R. 3195—The ADA Restoration Act of 2007

October 4, 2007

Chairman Nadler, Ranking Member Franks, and members of the Subcommittee, I am pleased to be able to present this testimony on behalf of the United States Chamber of Commerce addressing H.R. 3195, the ADA Restoration Act of 2007.

The United States Chamber of Commerce (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every industry, sector, and geographical region of the country. I serve as the Chair of the Chamber's policy advisory committee on equal employment opportunity matters.

The Chamber strongly supports equal opportunity in employment, in particular greater inclusion of people with disabilities in the workplace. While the Chamber believes H.R. 3195 is offered with the best of intentions to rectify perceived shortcomings in the Americans with Disabilities Act (the "ADA"), we respectfully disagree with respect to the impact that the bill's provisions would have and, for the reasons that will be discussed more fully in this testimony, the Chamber opposes H.R. 3195 as drafted.

Perhaps my own background may lend some authority to this testimony. I am a practicing employment lawyer and a partner in the Labor and Employment department of Proskauer Rose LLP in Washington, D.C. I have had a long involvement in the issues impacting the inclusion of the disabled in to the workplace. In 1975, I was privileged to be appointed as the Director of the Office of Federal Contract Compliance Programs ("OFCCP") and Deputy Assistant Secretary of the Department of Labor. In that capacity, I was responsible for reviewing the 1974 Amendments to the Rehabilitation Act of 1973. Subsequently, I was responsible for issuing the first regulations promulgated under § 503 of the Rehabilitation Act. These regulations require affirmative action and non-discrimination with respect to the handicapped by federal contractors. My agency also administered the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which required affirmative action and non-discrimination for Vietnam-

* I would also like to acknowledge Meredith C. Bailey, an associate at Proskauer Rose, for her invaluable assistance in the preparation of this testimony.

era veterans and disabled veterans of any era, and the first regulations under that statute were issued under my supervision. In addition, the OFCCP enforced Executive Order 11246, as amended requiring non-discrimination and affirmative action by federal contractors on the basis of race, gender and ethnicity.

In particular, my experience in enforcing § 503 and in supervising the final adoption of the post-1974 amendment regulations provide a valuable insight to the current legislation. Working on a blank slate, we understood certain principles. First, not every individual with an impairment would benefit from the program. To afford appropriate, targeted relief, we adopted as guidance the American Medical Association's Guides to the Evaluation of Permanent Impairment. Second, we understood that to enforce a new requirement, we must make employers aware of their responsibilities and covered individuals aware of their rights. So we instituted an enforcement program including back pay relief as well as vigorous outreach. I have appended to this testimony perhaps my most cherished memento from that time in my career: a memorandum from my executive staff, all career employees, enumerating what was achieved and what precedent was set at that time. While they had kind sentiments for me, they do set forth what became the framework for the treatment of employees under § 503, and which had some influence, we believe, on the subsequent issuance of the § 504 regulations—the basis for the ADA.

On July 26, 1990, the Americans with Disabilities Act of 1990 ("ADA") was signed into law.[1] President George H.W. Bush described the ADA as an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."[2] The goals of the ADA's passage were two-fold: (1) to provide a clear mandate for the elimination of discrimination against individuals with disabilities; (2) to address accommodation of disabled individuals in both society and the workplace.

For seventeen years, the ADA has fulfilled its promise to the individuals it was meant to protect—a protected class of individuals with "disabilities." The proposed legislation, which seeks to drastically alter the statutory scheme under the ADA, effectively dilutes the protections for those whom the ADA was originally enacted to protect. H.R. 3195 will relegate the ADA to a statement of principle lacking the structure and content needed to sustain changes for the inclusion of the disabled.

The ADA Restoration Act of 2007

H.R. 3195 represents a radical departure from the ADA. As written, the proposed legislation would drastically alter the statutory scheme in that it would:

- remove the current ADA requirement that a disability "substantially limit a major life activity;"

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[1] Pub. L. No. 101-336, 104 Stat. 327 (1990).

[2] President George Bush, *Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990, available at* http://www.presidency.ucsb.edu/ws/?pid=18712 (John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database)).

- effectively substitute the status of "impairment" for that of a "disability" to determine coverage under the ADA;

- prevent courts and employers from considering mitigating measures an individual may be using (such as medication or devices) when determining whether he or she is disabled; and

- shift the burden of proof from plaintiffs to employers regarding whether an individual is "qualified" to perform a job.

Nothing justifies such a drastic overhaul of the ADA.

The ADA was enacted in 1990 in response to a growing public awareness and concern about discrimination against people with disabilities and the effects of such discrimination on the economic and employment opportunities available to these individuals.[3] In his prepared statement before Congress, United States Attorney General Richard Thornburgh described the need to integrate disabled persons, otherwise ostracized, into the American economic and social fabric: "[M]any persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. . . . [P]ersons with disabilities are still too often shut out of the economic and social mainstream of American life."[4] The House Committee on Education and Labor's favorable report on the ADA concluded that "to the extent that the changes in practices and attitudes brought about by the implementation of the Act ultimately assist people with disabilities in becoming more productive and independent members of society, both they and our entire society benefit."[5] There was a clear understanding by the Administration supporting the ADA and the relevant committees that the Act would be directed to those unfairly and wastefully denied opportunities to be productive participants in the economy.

Congress recognized that the unique aspects of discrimination against individuals with disabilities required legislation that would be distinct from other civil rights statutes that preceded it. Civil rights statutes generally protect all individuals from discrimination on the grounds prohibited, whether it be age, sex, religion, or national origin.[6] The ADA, like the Age Discrimination in Employment Act, defined a distinct class to be afforded benefits and protection under the statute. Congress recognized it was imperative to define "disability," as it had defined "age," for purposes of extending civil rights protection to those truly in need of it. In doing so, it patterned the definition of disability after the Rehabilitation Act of 1973,[7] which requires that an "individual with a handicap" be "substantially limited in one or more major life activities."[8] The

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[3] Lauren J. McGarity, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 Yale L.J. 1161, 1164-5 (2000).

[4] *Americans with Disabilities Act of 1989: Hearing Before the Comm. of the Judiciary*, 101st Cong. (1989) (prepared statement of Richard Thornburgh, Attorney General of the United States of America), *as reprinted in* H. Comm. on Educ. and Lab., 101st Cong., Americans with Disabilities Act 2021; 2034-5 (Comm. Print 1990).

[5] H.R. Rep. No. 101-485, pt. 2, at 45-46, reprinted in 1990 U.S.C.C.A.N. at 327-28.

[6] Robert L. Burgdorf Jr., *The American with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. Rev. 413, 441 (1991).

[7] 29 U.S.C. § 794(a).

[8] H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 27; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 3 (199) at 50.

ADA Committee reports expressly endorse this definition.[9] In adopting the major life activity requirement, the Committee reports describe the need to clarify that "disability" does not include "minor, trivial impairments, such as a simple infected finger."[10]

H.R. 3195 removes the current ADA requirement that a disability "substantially limit a major life activity," such that it effectively substitutes the term "impairment" for "disability." This definition of disability mirrors an early version of a definition rejected by the ADA drafters.[11] Congress refused to adopt this overreaching definition because it conflicted with the then-fifteen year history of § 504 of the Rehabilitation Act of 1973, created an unworkable standard as a matter of policy, and effectively created a universal federal employment statute, rather than a statute directed at dealing with disabilities.

The definition of "disability" in H.R. 3195 undermines the original intent of the ADA in that it entitles anyone with a "physical or mental impairment" to the protection of the ADA.[12] Individuals with temporary or minor physical or mental "impairments" have not been the subject of such discrimination, nor have they been subject to prejudicial myths and stereotypes about their employability.[13] Changing the definition to provide ADA protection to individuals with commonplace impairments would cast the ADA's net too wide and diffuse protections afforded to the truly disabled.[14]

As a practical matter, the definition of "impairment" is so broad that any physical or mental health condition—no matter how minor—will satisfy the impairment requirement. Indeed, as the EEOC has noted, "the determination of whether an individual has a 'disability' in not necessarily based on the name of the diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[15] Because the definition of "physical or mental impairment" is so expansive, there has been minimal litigation regarding what conditions constitute "impairments." The few courts which have addressed the issue have recognized that relatively minor conditions meet the definition of impairment, but not an ADA disability. Examples include:

- back and knee strains,[16]
- erectile dysfunction,[17]

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[9] S. Rep. No. 116, 101st Cong. 1st Sess. 22 (1989); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 52 (1990); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 28 (1990).

[10] S. Rep. No. 116, 101st Cong. 1st Sess. 23 (1990); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 52 (1990).

[11] The ADA drafters rejected an early version of the ADA that prohibited discrimination "because of a physical or mental impairment, perceived impairment or record of impairment," favoring instead the framework of the ADA's statutory precursor, the Rehabilitation Act of 1973. *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And what Can We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91 (2000).

[12] *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91, 101 (2000) (stating that an "argument can be made that not every person with a physical or mental impairment experiences discrimination.").

[13] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 251 (2002).

[14] Katherine Jsu Hagmann-Borenstein, *Much Ado About Nothing: Has the U.S. Supreme Court's Sutton Decision Thwarted a Flood of Frivolous Litigation*, 37 Conn. L. Rev. 1121, 1134 (2005).

[15] 29 C.F.R. pt. 1630, App. § 1630.2(j).

[16] *Benoit v. Tech. Mfg. Corp.*, 331 F.3d 166 (1st Cir. 2003).

- headaches,[18]
- "tennis elbow."[19]

It is, therefore, critical that the scope of the ADA definition of "disability" be sufficiently defined to ensure that truly disabled, but genuinely capable, individuals will receive protection and opportunities under the statute. The ADA's noble purpose—the elimination of discrimination in employment based on stereotypes about the insurmountability of disability—would be debased if the statutory protections available to those who are truly disabled could be claimed by *anyone* whose disability was minor and whose relative severity of impairment was widely shared.

The United States Supreme Court decisions[20] that have been such a magnet for controversy are wholly consistent with the ADA's language and intent. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court held that the phrase "substantially limits one or more major life activities" distinguishes a mere impairment from an actionable disability under the ADA.[21] Similarly, in *Sutton*, and its companion cases, the Supreme Court ruled in a seven to two decision that if a person takes steps "to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity."[22]

The problems cited by proponents of this legislation are derived, in part, from the lack of a simplistic "one size fits all" approach to the ADA. Determinations about who qualifies for protection under the law and what is required once protection is afforded are not easily solved in the context of disability law. This has required courts to craft a jurisprudence that addresses the unique facts and circumstances of each job situation.[23] The Supreme Court opinions, which are oft-criticized as having "unduly narrowed the broad scope of protection afforded in the ADA,"[24] have instead preserved the protections of the ADA by carefully crafting opinions that recognize the devastating effect that an expansive interpretation of "disability" could have on the ADA's intended beneficiaries.

The three cases in the "*Sutton*-trilogy" represent the Supreme Court's careful approach. In *Sutton*, for example, plaintiffs with myopic vision attempted to use the ADA to circumvent the defendant airline's minimum vision requirement to become commercial pilots. The facts in *Sutton* may have influenced the outcome: the Court might not have wanted to tell commercial

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[17] *Arrieta-Colon v. Wal-Mart P.R., Inc.*, 434 F.3d 75 (1st Cir. 2006).
[18] *Sinclair Williams v. Stark County Bd. of Comm'rs*, No. 99-4081, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001).
[19] *Cella v. Villanova Univ.*, No. 03-1749, 2004 U.S. App. LEXIS 21740 (3d Cir. 2004).
[20] *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Toyota Motor Mfg, Ky, Inc. v. Williams*, 534 U.S. 184 (2002).
[21] *Toyota*, 534 U.S. at 197. It is important to note that the decision did not eliminate all people with carpal tunnel syndrome from the ADA's protections. The case merely requires the individualized analysis to include an examination of manual tasks essential to daily living. *See* Commissioner Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 Brandeis L.J. 769, 773 (2003).

[22] *Sutton*, 527 U.S. at 482.
[23] Commissioner Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 Brandeis L.J. 769, 771 (2003).
[24] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 2 (2007).

airlines that they could not establish rigorous vision standards for their pilots.[25] On the same day it decided *Sutton*, the Supreme Court also issued its opinion in *Albertson's, Inc. v. Kirkingburg*. The plaintiff in that case had a similar, monocular vision impairment. Justice Souter held that the determination of disability under the ADA is not a *per se* categorical test based on an impairment's name or characteristics. [26] The Court simply held that "the [ADA] requires monocular individuals, like others claiming the [ADA's] protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial."[27]

Finally, in *Murphy*, the plaintiff, a mechanic, was fired because he did not satisfy Department of Transportation ("DOT") health standards for commercial drivers because of his high blood pressure. In holding that the plaintiff was not substantially limited in working, the court noted that there were many other jobs the plaintiff could perform, including a number of mechanic jobs *not* requiring DOT certification. The court pointed out that the plaintiff in fact "secured another job as a mechanic shortly after leaving UPS."[28]

Proponents of this legislation claim that the *Sutton*-trilogy has narrowed the protected class under the ADA by effectively excluding individuals who attempt to mitigate or control a disability. Such concerns are largely unfounded. In an explicit attempt to clarify the specific nature of its holding, the Supreme Court majority in *Sutton* was careful to identify groups of individuals that would still be entitled to the law's protections.[29] For example, the majority in *Sutton* responded to the dissent's argument that viewing individuals in their corrected state created an overly exclusive definition of disability by pointing out that individuals with prosthetic limbs, for example, "may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run."[30] The majority clarified that "the use or nonuse of a corrective device does not determine whether the individual with an impairment is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are substantially limiting."[31]

The fact that other courts have maintained the contours of the ADA legislation reinforces the conclusion that Supreme Court disabilities cases are undeserving of the criticism leveled by advocacy groups. For instance, in *Nawrot v. CPC International*,[32] the plaintiff sufficiently demonstrated that his diabetes substantially limited "his ability to think and care for himself, which are both major life activities."[33] Likewise, a prosthesis may be the cause of a substantial limitation. In *Belk v. Southwestern Bell Telephone Co.*,[34] the court noted that, in addition to

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[25] Mark A. Rothenstein, *et. al.*, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 265 (2002).
[26] *Albertson's*, 527 U.S. at 566.
[27] *Id.* at 567.
[28] *Murphy*, 527 U.S. at 524.
[29] Lauren J. McGarity, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 Yale L.J. 1161, 1162 (2000).
[30] *Sutton*, 527 U.S. at 488.
[31] *Id.*
[32] 277 F.3d 896 (7th Cir. 2002).
[33] *Id.* at 905.
[34] 194 F.3d 946 (8th Cir. 1999)

having a "pronounced limp" because of residual effects from polio, the plaintiff's "full range of motion in his leg is limited by the brace" he wore for his condition.[35]

Even assuming that the courts have not struck the appropriate balance under the ADA, the proposed bill does not provide the "modest, reasonable legislative fix" called for by Senator Tom Harkin (D-IA) in response to the Supreme Court decisions.[36] H.R. 3195 drastically re-writes the ADA, without providing any degree of clarity to employers, employees, or the courts in resolving the basic issues of who is covered under the ADA, except, perhaps, indicating that everyone is to be covered.[37] The purpose of the ADA is to establish a clear and comprehensive prohibition of discrimination on the basis of disability and vigorous and effective remedies, and, in so doing, create a strong impetus for self-correction.[38]

H.R. 3195, as proposed, does not achieve this goal. Indeed, it moves the entire process into a mode predominated by litigation. The proponents of H.R. 3195 argue that the low success rate of charging parties at the EEOC and in court compels the sweeping changes contemplated by the bill. This argument lacks logic. It presumes that "success" is measured by lawsuits or that it is inconceivable that after seventeen years of experience under the ADA, employers might not understand their requirements and proactively move to meet them. Rather than acknowledging that the wisdom of President George H.W. Bush and Attorney General Thornburgh has been realized, the proponents of H.R. 3195 offer, instead, interminable individual litigation instead of cooperative problem resolution.

Because the definition of disability delineates the class of individuals protected by the ADA,[39] expanding the definition of disabled to include all individuals with a "physical or mental impairment" would change the scope of the ADA, and effectively negate the underlying legislative scheme intended to prevent, and, if necessary, remedy, disability discrimination. Currently, the ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees . . . ."[40] In addition, "discrimination" under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[41]

The duty to provide reasonable accommodation is a fundamental component of the ADA given that the nature of discrimination faced by individuals is a result of a unique disability.

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[35] *Id.* at 950.

[36] Michael Sandler, *Bill Seeks to Broaden Definition of 'Disability'*, CQ.com, *available at* http://www.aapd-dc.org/News/adainthe/070727cq.htm.

[37] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 269-270.

[38] *See* 42 U.S.C. § 12101(b).

[39] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 296 (2002).

[40] 42 U.S.C. § 12112(a).

[41] *Id.* at § 12112(b)(5)(A).

Thus, the reasonable accommodation process requires the employer to engage in the interactive process and render an individualized assessment[42] to the disabled employee. The individualized assessment generally entails identifying the nature and extent of the impairment, the resulting limitations, the essential functions of the occupation, and the nexus between the worker's limitations and the essential functions. From there, employers and their employees collaborate to identify possible options, evaluate their efficacy, and determine the most reasonable solution.

If H.R. 3195 becomes law, every employee with an impairment will be entitled to reasonable accommodation from an employer for any limitation resulting from that "disability," except if the employer can show undue hardship. When one remembers the broad nature of accommodation, the results will be overwhelming to employers. Employers can expect significant increases in requests for leave, modified schedules, teleworking, exceptions to workplace policies, and removal of marginal functions. Every employee who wants leave (full day, half day, intermittent) for a cold, a headache, seasonal allergy, or a bad back could be entitled to such leave. There is no twelve-week cap on leave as there if for FMLA; for many employers it will be impossible to show undue hardship even when intermittent leave for such conditions is over twelve weeks.

Furthermore, this expanded right to reasonable accommodation for persons with minor impairments will force those with true disabilities to compete for certain limited accommodations. For example, there are likely to be occasions when two employees will compete for a reassignment, but there will be only one vacant job. That reassignment could well go to someone with a minor impairment rather than the person now covered under the ADA. Similarly, there are only so many parking spaces next to a door. A person with a sprained ankle could well make a request before the person who is a paraplegic, or missing a leg, or someone with severe emphysema. Nothing in the bill or ADA would require or even allow an employer to give preference to the person with the more serious condition; under the bill there would be no legal difference between the sprained ankle and paraplegia. While this problem does exist to some extent under current law, expanding the definition to include all impairments will exacerbate it.

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[42] Ten years after the passage of the ADA, Chai Feldblum described the great import of individualized assessments with respect to disability law:

> [I]ndividualized assessments lie at the very core of disability anti-discrimination law. Because one of the causes of discrimination faced by people with disabilities is stereotypes regarding what people with disabilities are capable of doing, it is critical that each person with a disability be assessed to determine his or her capacity to do a job. Moreover, because an employer is obliged to make those reasonable accommodations that will allow an employee to be qualified for a particular job, disability law presumes the need for intensive individualized assessments whenever reasonable accommodation is at issue.

Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91, 151-2 (2000).

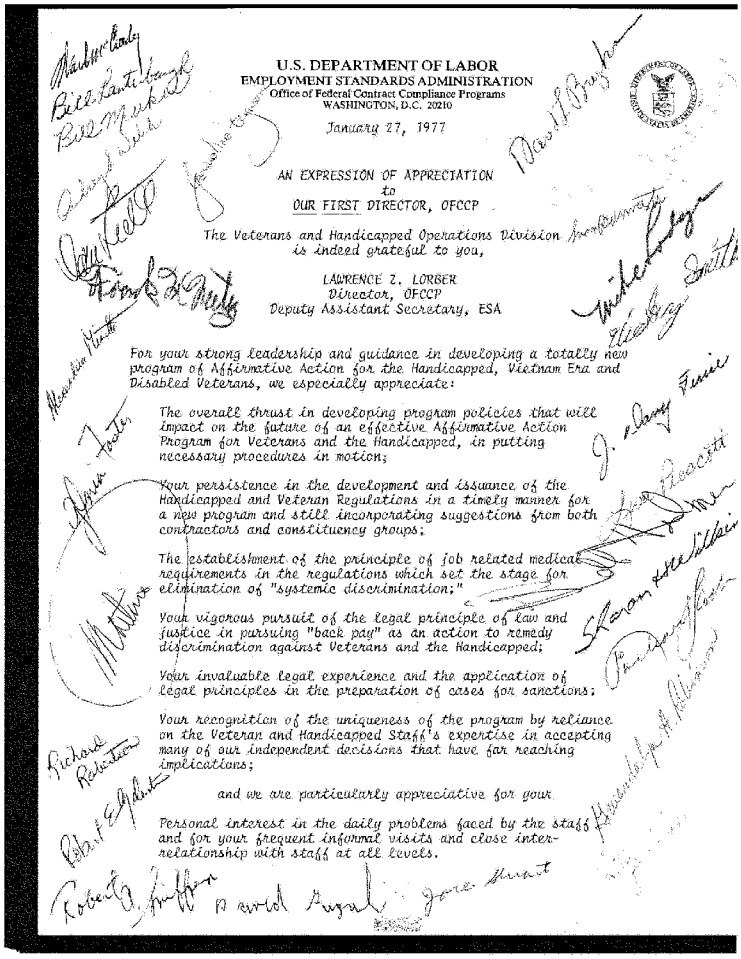
Furthermore, the bill will make it far easier to have class action lawsuits on a wide array of disability-related issues since there no longer will be any individualized assessment of "disability."

The underlying premise of the reasonable accommodation scheme is that the individual is first "qualified" under the ADA standards. Section 5 of H.R. 3195 strikes the requirement that an individual be "qualified" (*i.e.* able to perform the job with or without accommodation) before determining whether an employer must accommodate under the ADA. Instead, the legislation would place the burden on employers to prove that a disability discrimination plaintiff is "not qualified."[43]

By shifting the burden, which was fundamental to the consideration of the ADA, H.R. 3195 makes a nullity of the basis for joint examination of the job and the accommodation. By removing the requirement that an individual first be "qualified," H.R. 3195 provides no logical basis to retain the current statutory structures of the ADA, including the interactive process and individualized assessment, that have proven so valuable in advancing the rights of disabled individuals. It is these special features of the ADA not found in other non-discrimination laws which makes the ADA particularly directed to the needs of the disabled. The proposed legislation would eviscerate the special protections by an unreasonable stroke of a pen.

The "ADA Restoration Act of 2007" would radically expand the ADA's coverage by redefining the term "disabled" By changing the definition of "disability" the proposed legislation, in turn, alters the scope of the ADA so as to make it almost unrecognizable. The interests of the employment community and the disabled individuals that the ADA is meant to protect are not mutually exclusive. The Chamber of Commerce recognizes that any statutory scheme deserves reexamination after seventeen years of experience. However, it rejects the notion that the long experience under the Rehabilitation Act of 1973 and the ADA be tossed aside and replaced by a litigation regime not focused on the universally lauded goal of full inclusion of qualified individuals with disabilities into the mainstream of American life.

[43] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 5 (2007).



U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance Programs
WASHINGTON, D.C. 20210

January 27, 1977

AN EXPRESSION OF APPRECIATION
to
OUR FIRST DIRECTOR, OFCCP

The Veterans and Handicapped Operations Division is indeed grateful to you,

LAWRENCE Z. LORBER
Director, OFCCP
Deputy Assistant Secretary, ESA

For your strong leadership and guidance in developing a totally new program of Affirmative Action for the Handicapped, Vietnam Era and Disabled Veterans, we especially appreciate:

The overall thrust in developing program policies that will impact on the future of an effective Affirmative Action Program for Veterans and the Handicapped, in putting necessary procedures in motion;

Your persistence in the development and issuance of the Handicapped and Veteran Regulations in a timely manner for a new program and still incorporating suggestions from both contractors and constituency groups;

The establishment of the principle of job related medical requirements in the regulations which set the stage for elimination of "systemic discrimination;"

Your vigorous pursuit of the legal principle of law and justice in pursuing "back pay" as an action to remedy discrimination against Veterans and the Handicapped;

Your invaluable legal experience and the application of legal principles in the preparation of cases for sanctions;

Your recognition of the uniqueness of the program by reliance on the Veteran and Handicapped Staff's expertise in accepting many of our independent decisions that have far reaching implications;

and we are particularly appreciative for your

Personal interest in the daily problems faced by the staff and for your frequent informal visits and close inter-relationship with staff at all levels.

Mr. NADLER. Thank you.

And our final witness who will be recognized for 5 minutes is Professor Feldblum.

TESTIMONY OF CHAI R. FELDBLUM, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Ms. FELDBLUM. Thank you, Mr. Chairman.

Mr. Lorber says here what he also says in his written testimony, that in 1989 Congress looked at a bill that would have language like the ADA Restoration Act and deliberately decided not to go that route and instead to go the route of the language in the bill of the ADA. And therefore, it would be impossible to say that if you went back to that language, that you would be restoring your intent.

Sounds like a pretty strong argument. So I went to see what his citation was for that. His citation was my law review article that I wrote. So if you actually read the rest of the law review article, you see that in 1986, the National Council on Disability, as you have just heard from Mr. Collins, recommended that there be an Americans with Disabilities Act, and they recommended a set of language that said "physical or mental impairment," and they had definitions of physical and mental impairment.

And we all said why are you using different language? We totally get what you are trying to achieve, that anyone who has a physical or mental impairment, and was discriminated against on that basis, should, as you heard from Cheryl Sensenbrenner, be able to bring a claim. If that is what you are trying to achieve, we said, you don't need to use those words. We have words that have been in place for 15 years. We have lots and lots of cases. And under those cases, everyone with a range of impairments has been covered either under the first prong of the definition, an impairment that substantially limits a major life activity, or they were covered under the third prong, they were regarded as, they were perceived.

So what you are trying to achieve with this language, we can achieve with language that has been used for 15 years. That is why the language in the bill from 1988 was not accepted, and instead we went to the language of section 504.

Well, guess what happened? As you heard, the Supreme Court took the new language and started reading in all types of limitations that had never been put in there by courts in section 504. So now in 2007, we are back here again with the recommendation from the National Council on Disability saying you know what, maybe our first suggestion was the better one. And that is what H.R. 3195 does.

So really, Members of this Subcommittee, the question before you is a very simple one. As a matter of policy, is the ADA doing the job you wanted it to do? Is it covering the people from the types of discrimination you wanted to stop? It is a very simple question. And the answer is very simple as well. The answer is no.

Let me tell you, I worked with Larry Lorber back then, and I have a lot of respect for him. But there was one sentence in his written testimony that really caught me. It was this: "For 17 years, the ADA has fulfilled its promise to the individuals it was meant to protect, a protected class of individuals with disabilities."

With all due respect, this statement is not true. If it were true, we would not be sitting here today. If it were true, Mr. Orr would still have his job in the pharmacy with a regularly scheduled half-hour break to take his insulin.

So how did the promise get so messed up? You have heard already and so I will only add two things in terms of the legal piece, and then I look forward to the questions. First, in the case of *Sutton v. United Airlines,* which you heard about, the Supreme Court had to decide whether the agency, the EEOC, was correct in saying that you don't take into account mitigating measures when you decide if someone's impairment "substantially" limits a major life "activity." That language we gad decided to use.

The agency was not going out on a limb when it said don't take into account mitigating measures. As the Chairman noted, this Committee as well as three others said the same thing in its report—don't take into account mitigating measures.

What did the Supreme Court say? "We conclude that the approach adopted by the agency guidelines is an impermissible interpretation of the ADA." Wow. An impermissible interpretation of the ADA. How do they deal with three Committee reports that say this is the interpretation we want? What the Court said was, "Because we decide that by its terms the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history." Because the words are so clear to us about what Congress intended, we don't have to go to the legislative history.

The Supreme Court read the words in a certain way. If you don't agree, you need to change those words. And that is the same thing that they did in the *Toyota* case in terms of reading "substantially limited" to create the demanding standard. If you don't think it should create the demanding standard, you have to change the words.

That is all that the ADA Restoration Act is doing. It is time for Congress to write this law more clearly and more plainly so that the promise of the ADA can indeed finally be fulfilled.

Thank you.

[The prepared statement of Ms. Feldblum follows:]

PREPARED STATEMENT OF CHAI R. FELDBLUM

Testimony of Chai R. Feldblum

Professor of Law

Director, Federal Legislation Clinic

Georgetown University Law Center

Hearing On:

The ADA Restoration Act of 2007 –

"A Bill to Restore the Intent and Protections of

the Americans with Disabilities Act of 1990"

Before the

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

of the

Committee on the Judiciary

United States House of Representatives

Washington, D.C.

October 4, 2007

Mr. Chairman and Members of the Subcommittee, I am pleased to testify before you today. My name is Chai Feldblum, and I am a Professor of Law and Director of the Federal Legislation Clinic at Georgetown University Law Center. The lawyers and students at the Federal Legislation Clinic provide *pro bono* legislative lawyering services to the Epilepsy Foundation in support of its efforts to advance the ADA Restoration Act. Today, however, I am testifying on my own behalf as an expert on the subject matter of this hearing. During passage of the original Americans with Disabilities Act of 1990 (ADA), I served as one of the lead legal advisors to the disability and civil rights communities in the drafting and negotiating of that legislation.

In this testimony, I provide a brief overview of the bipartisan support that propelled passage of the ADA in 1990 and I describe how Congress intended the ADA's definition of disability to be consistent with the definition of "handicap" that had been applied by the courts for fifteen years under a prior disability anti-discrimination law. I then explain how the courts subsequently narrowed the definition of disability under the ADA in a manner that was inconsistent with Congressional intent and offer some observations on why courts may have acted in such a manner. Finally, I describe the specific ways in which H.R. 3195, the ADA Restoration Act, restores original Congressional intent.

I. The Bi-Partisan Enactment of the ADA

A first version of the ADA was introduced in April 1988 by Congressman Tony Coelho and 45 cosponsors in the House of Representatives and by Senators Lowell Weicker and Tom Harkin and twelve other cosponsors in the Senate.[1] This version of the ADA was based on a draft from the National Council on Disability (NCD), an independent federal agency composed of 15 members appointed by President George H.W. Bush which was established by Congress to advise the President and Congress on issues concerning people with disabilities.[2]

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[1] H.R. 4498, 100th Cong., 2d Sess., 134 CONG. REC. H2757 (daily ed. Apr. 29, 1988) (introduction of H.R. 4498); S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5089 (daily ed. Apr. 28, 1988) (introduction of S. 2345).

[2] NATIONAL COUNCIL ON DISABILITIES, ON THE THRESHOLD OF INDEPENDENCE (1988), *available at* http://www.ncd.gov/newsroom/publications/1988/threshold.htm. Lowell Weicker, at that time, the Republican Senator from Connecticut and the ranking minority member of the Subcommittee on the

In May 1989, a second version of the ADA was introduced by Congressman Steny Hoyer and 45 cosponsors in the House of Representatives and by Senators Tom Harkin, Edward Kennedy, Robert Dole and 31 other cosponsors in the Senate.[3] This version of the bill was the result of extensive discussions with a wide range of interested parties, including members of the disability community, the business community, and the first Bush Administration.[4]

Negotiations on the ADA continued within each committee that reviewed the bill and, in each case, the negotiations resulted in broad, bipartisan support of the legislation. The Senate Committee on Labor and Human Resources favorably reported the bill by a vote of 16-0;[5] the House Committee on Education and Labor favorably reported the bill by a vote of 35-0;[6] the House Committee on Energy and Commerce favorably reported the bill by a vote of 40-3;[7] the House Committee on Public Works and Transportation favorably reported the bill by a vote of 45-5;[8] and the House Committee on the Judiciary favorably reported the bill by a vote of 32-3.[9]

After being reported out of the various committees, the ADA passed by wide margins in the House of Representatives, by a vote of 403-20, and in the Senate, by a vote of 76-8.[10] Both Houses of Congress subsequently passed the conference report by large margins as well: 91-6 in the Senate and 377-28 in the House of Representatives.[11]

On July 26, 1990, President George H.W. Bush signed the ADA into law, stating:

Handicapped, was approached by the National Council on Disability to take the lead on the ADA because of his longstanding interest in the area of disability rights. Senator Tom Harkin, a Democratic Senator from Iowa and Chairman of the Subcommittee on the Handicapped, worked closely with Senator Weicker in this endeavor. In the House of Representatives, Congressman Tony Coelho, a Democrat from California and third-ranking Member in the House Democratic Leadership, was the key leader in the development of the ADA.

[3] H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. H1791 (daily ed. May 9, 1989); S. 933, 101st Cong., 1st Sess., 135 CONG. REC. S4984-98 (daily ed. May 9, 1989).

[4] *See* Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMPLE LAW REVIEW 521, 521-532 (1991) (providing brief overview of passage of the ADA).

[5] S. REP. NO. 101-116 at 1 (1989).

[6] H.R. REP. NO. 101-485, pt. 2, at 50 (1990).

[7] H.R. REP. NO. 101-485, pt. 4, at 29 (1990).

[8] H.R. REP. NO. 101-485, pt. 1, at 52 (1990).

[9] H.R. REP. NO. 101-485, pt. 3, at 25 (1990).

[10] 136 CONG. REC. H2638 (daily ed. May 22, 1990); 135 CONG. REC. S10803 (daily ed. Sept. 7, 1989).

[11] 136 CONG. REC. S9695 (daily ed. July 13, 1990); 136 CONG. REC. H4629 (daily ed. July 12, 1990).

> "[N]ow I sign legislation which takes a sledgehammer to [a] . . . wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but could not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America."[12]

Standing together, leaders from both parties described the ADA as "historic," "landmark," and an "emancipation proclamation for people with disabilities."[13]

The purpose of the original legislation was to "provide a clear and comprehensive national mandate for the elimination of discrimination" on the basis of disability, and "to provide clear, strong, consistent, enforceable standards" for addressing such discrimination.[14] Thus, it was the hope of Congress that people with disabilities would be protected from discrimination in the same manner as those who experienced discrimination on the basis of race, color, sex, national origin, religion, or age.[15]

But that did not happen. In recent years, the Supreme Court has restricted the reach of the ADA's protections by narrowly construing the definition of disability contrary to Congressional intent. As a result, people with a wide range of impairments whom Congress intended to protect, including people with cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, PTSD, and many other impairments, are routinely found not to be "disabled" and therefore not covered by the ADA.

The difficulty with this scope of coverage under the ADA is *significant* – studies show that plaintiffs lose 97% of ADA employment discrimination claims, mostly on the grounds that they do not meet the definition of "disability."[16] The National Council on

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[12] Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), *available at* http://www.eeoc.gov/ada/bushspeech.html.

[13] According to President George H.W. Bush, the ADA was a "landmark" law, an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities." *See id.* Senator Orrin G. Hatch declared that the ADA was "historic legislation" demonstrating that "in this great country of freedom, . . . we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society." Senator Edward M. Kennedy called the ADA a "bill of rights" and "emancipation proclamation" for people with disabilities. *See* National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper* (October 16, 2002), available at http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm.

[14] *See* Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

[15] 42 U.S.C. § 12101 (a), (b).

[16] Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I – Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/August 2007) (stating that in 2006, "[o]f the 218 [employment discrimination] decisions that resolved the claim (and have not yet changed on appeal), 97.2 percent

Disability has stated that Supreme Court decisions narrowing the definition of disability "ha[ve] significantly diminished the civil rights of people with disabilities," "blunt[ing] the Act's impact in significant ways," and "dramatic[ally] narrowing and weakening . . . the protection provided by the ADA."[17]

As demonstrated by the legislative history, Congress never intended the ADA's definition to be interpreted in such a restrictive fashion.

II. Congressional Intent Behind the ADA's Definition of Disability

When writing the ADA that was introduced in 1989, Congress borrowed the definition of "disability" from Section 504 of the Rehabilitation Act of 1973, a predecessor civil rights statute for people with disabilities that covers recipients of federal financial assistance. Section 504 defines disability as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.[18]

For fifteen years, the courts had interpreted this definition to cover a wide range of physical and mental impairments, including epilepsy, diabetes, intellectual and

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resulted in employer wins and 2.8 percent in employee wins"); *see also* Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I – Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319-20 (May/June 2003) ("One such obstacle [for plaintiffs to overcome] is satisfying the requirements that the plaintiff meet the ADA's restrictive definition of disability – a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment – and still be qualified to perform essential job functions with or without reasonable accommodation. *A clear majority of the employer wins in this survey were due to employees' failure to show that they had a protected disability.*") (emphasis added); *see also* Ruth Colker, *Winning and Losing Under the ADA*, 62 OHIO ST. L.J. 239, 246 (2001) ("[A]ppellate litigation outcomes under the ADA are more pro-defendant than under other civil rights statutes."); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100-01 ("[C]ontrary to popular media accounts, defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases. These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly.").

[17] NATIONAL COUNCIL ON DISABILITIES, RIGHTING THE ADA, pt. I (2004), *available at* http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.

[18] 29 U.S.C. § 705(20)(B) (2007); *see* Americans with Disabilities Act, 42 U.S.C. § 12101(2) (2007). At the time the ADA was being drafted, Section 504 used the term "handicap" rather than "disability." Section 504 has since been amended to use the term "disability." The language of "handicap" under Section 504 and "disability" under the ADA is identical.

developmental disabilities, multiple sclerosis, PTSD, and HIV infection.[19] Indeed, in *School Board of Nassau County v. Arline*, the Supreme Court explicitly acknowledged that Section 504's "definition of handicap is broad," and that by extending the definition to cover those "regarded as" handicapped, Congress intended to cover those who are not limited by an actual impairment but are instead limited by "society's accumulated myths and fears about disability and disease."[20]

When the ADA was enacted, Congress consistently referred to court interpretations of "handicap" under Section 504 as its model for the scope of "disability" under the ADA. For example, the House Committee on the Judiciary observed that: "The ADA uses the same basic definition of 'disability' first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988. . . . [I]t has worked well since it was adopted in 1973."[21] The House Committee on Education and Labor and the Senate Committee on Labor and Human Resources made similar observations, and specifically referenced the breadth of the interpretation offered by the Supreme Court in the *Arline* decision.[22]

The committee reports also explicitly stated that mitigating measures should not be taken into account in determining whether a person has a "disability" for purposes of the ADA. As the House Committee on Education and Labor put it:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity, are covered

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[19] "[A]lthough there had been . . . a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act." Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 128 (2000) (hereinafter "Definition of Disability"); *see, e.g.*, Local 1812, Am. Fed'n. of Gov't Employees v. U.S., 662 F. Supp. 50, 54 (D.D.C. 1987) (person with HIV disabled); Reynolds v. Brock, 815 F.2d 571, 573 (9th Cir. 1987) (person with epilepsy disabled); Flowers v. Webb, 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983) (person with intellectual and developmental disabilities disabled); Schmidt v. Bell, No. 82-1758, 1983 WL 631, at *10 (E.D. Pa. Sept. 9, 1983) (person with PTSD disabled); Bentivegna v. U.S. Dep't of Labor, 694 F.2d 619, 621 (9th Cir. 1982) (person with diabetes disabled); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1376 (10th Cir. 1981) (person with multiple sclerosis disabled).

[20] *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[21] H.R. REP. NO. 101-485, pt. 3, at 27 (1990).

[22] H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (discussing *Arline*); S. REP. NO. 101-116 at 21, 23-24 (1989) (discussing Section 504 and *Arline*).

under the first prong of the definition, even if the effects of the impairment are controlled by medication.[23]

As evident from the ADA's legislative history, Congress' decision to adopt the Section 504 definition of disability was a deliberate decision to cover the same wide group of individuals who had been covered under Section 504. Congress expected that the definition of "disability" would be interpreted as broadly under the ADA as it had been under the existing disability rights law.

Disability rights advocates like myself – blissfully unaware of what the future would hold for the definition of disability – fully supported Congress' incorporation of the Section 504 definition into the ADA. We agreed with Congress' legal judgment that the fifteen-year-old definition would cover people with a wide range of physical and mental impairments, based on the record in the case law under Section 504. In addition, we were particularly reassured by the reasoning of the Supreme Court just two years earlier in the *Arline* case – the case so consistently referred to in the various committee reports. In that case, the Supreme Court had reasoned that an employer who fired an individual from one job *because of* an impairment (in that case, a teacher who had recovered from tuberculosis) must have *regarded that* individual as limited in the life activity of *working*.[24] Under such an interpretation, the third prong of the definition was clearly sufficiently broad to capture any individual who had been explicitly discriminated against because of an impairment.[25]

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[23] H.R. REP. NO. 101-485, pt. 2, at 52 (1990); *see also* H.R. REP. NO. 101-485, pt. 3, at 28-29 (1990); S. REP. NO. 101-116 at 23 (1989).

[24] During oral argument in *Arline*, the Solicitor General had sought to reject such an interpretation of the "regarded as" prong of the definition of handicap, noting that such an approach would allow plaintiffs to make "a totally circular argument which lifts itself by its bootstraps." *Arline*, 480 U.S. at 283 n.10 (1987). But the Court had responded that "[t]he argument is not circular, however, but direct." *Id.* As the Court explained: "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." *Id.* And, as the Court explained: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Id.* at 283; *see* Feldblum, *Definition of Disability*, *supra* note 19, 116-118 for a full analysis of the *Arline* opinion.

[25] As the Senate Committee on Labor and Human Resources Report summarized the coverage under the third prong: "A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes toward disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the

We were soon to be rudely surprised by new interpretations of the definition of disability by various courts, including the Supreme Court.

III. Judicial Narrowing of Coverage Under the ADA

Over the past several years, the Supreme Court and lower courts have narrowed coverage under the ADA by interpreting *each and every component* of the ADA's definition of disability in a *strict and constrained fashion*. This has resulted in the exclusion of many persons that, based on a reading of the legislative history of the ADA, Congress intended to protect.

The Supreme Court has narrowed coverage under the ADA in three primary ways:

(A) by requiring people alleging disability-based discrimination to meet a demanding standard for qualifying as "disabled";

(B) by requiring courts to consider mitigating measures in determining whether a person is "disabled"; and

(C) by requiring people alleging that they were "regarded as" disabled to show that employers believed them incapable of performing not just one job, but a *broad range of jobs*.

A. Demanding Standard: Substantially Limits a Major Life Activity

The Supreme Court, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, ruled that the words "substantially limits" and "major life activities" in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[26] This was contrary to the various statements in the legislative history indicating an assumption that the definition of disability would be interpreted broadly.

As a result of this ruling, people alleging discrimination must now show that their impairments *prevent* or *severely restrict* them from doing activities that are of *central importance* to *most* people's daily lives. So, according to some recent court decisions:

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employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong." S. REP. NO. 101-116 at 24 (1989).

[26] Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

► If you have muscular dystrophy and you cannot lift your arms above your head, but you are able to brush your teeth and wash your hair by supporting one arm with the other – you are not prevented/severely restricted from doing these life activities and therefore you are not "disabled" under the ADA.[27]

► If you have seizures in your sleep and you wake up with bruises all down your arms and legs and you only get a few hours of restful sleep – you are not prevented/severely restricted from sleeping and therefore you are not "disabled" under the ADA.[28]

► If you are a right-hand dominant person whose right arm was amputated below the elbow, but you are not "prevented or severely restricted from doing activities that are of central importance to most people's daily's lives . . . [like] household chores, bathing oneself, and brushing one's teeth," you have only a "physical impairment, nothing more," and, therefore, you are not "disabled" under the ADA.[29]

► If you experience a traumatic brain injury (causing a four-month coma, weeks of rehabilitation and an inability to work for fourteen years) and then continue to have blurred vision, dizziness, spasms in your arms and hands, slowed learning, headaches, poor coordination, and slowed speech – but you fail to demonstrate precisely how these limitations "substantially" impact your functioning – you are not "disabled" under the ADA.[30]

► If you experience an injury that permanently limits your use of one hand, that does not mean that you are "so far disabled as to fall within the restrictive meaning the ADA assigns to the term."[31]

► If you undergo a mastectomy, chemotherapy, and radiation therapy for breast cancer, and, as a result, you are unable to lift your arm above your head and you experience fatigue and concentration and memory problems, you are not "disabled" under the ADA because these side effects "[a]re (relatively

[27] McClure v. General Motors Corp., 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).
[28] Equal Employment Opportunity Comm'n v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001).
[29] Williams v. Cars Collision Center, LLC, No. 06 C 2105 (N.D. Ill. July 9, 2007).
[30] Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274 (S.D. Ala. 1999).
[31] Tockes v. Air-Land Transport Services, Inc., 343 F.3d 895, 896 (7th Cir. 2003).

speaking) short-lived" and therefore "they d[o] not have a substantial and lasting effect on the major activities of [your] daily life."[32]

► If you permanently injure your arm and are fired because of limitations resulting from that injury, but you are able to perform activities of daily living, "such as shaving and brushing [your] teeth, with [your] left hand," you are not "disabled" under the ADA because you have not "met [your] burden of showing that the extent of [your] limitations due to [the] impairment [is] 'substantial.'"[33]

► If you have intellectual and developmental disabilities (what some courts term "mental retardation") that limit your ability to think, communicate, and interact, you may not be "disabled" because "[i]t is unclear whether thinking, communicating, and social interaction are 'major life activities' under the ADA."[34] And even if thinking, communicating, and interacting *are* sufficiently "major" life activities, you are still not "substantially" limited in these activities – and therefore not "disabled" under the ADA – if you are able to drive a car and to communicate with words.[35]

As demonstrated by these decisions, the Supreme Court's "demanding standard for qualifying as disabled" has resulted in the exclusion from coverage under the ADA of a range of individuals that Congress intended to protect and indeed – that any ordinary American hearing these stories would imagine would be protected under the Americans with Disabilities Act.

The Supreme Court's narrow reading is in marked contrast to the cases that had been decided under Section 504 of the Rehabilitation Act, which Congress had before it as precedent when it enacted the ADA. In these cases, the courts had tended to decide questions of coverage easily and without extensive analysis.[36] This narrow reading is likewise inconsistent with other civil rights statutes, such as the Civil Rights Act of 1964

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[32] Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177, 183 (D.N.H. 2002).
[33] Didier v. Schwan Food Co., 387 F. Supp. 2d 987, 991 (W.D. Ark. 2005).
[34] Littleton v. Wal-Mart Stores, Inc., 231 Fed. Appx. 874, 877-78 (11th Cir. 2007).
[35] *Id.*
[36] Feldblum, *Definition of Disability*, *supra* note 19, at 128; *see also* Consortium for Citizens with Disabilities, *People Covered Under Section 504 of the Rehabilitation Act/People Not Covered Under the ADA*, *available at* http://www.c-c-d.org/task_forces/rights/Rehab%20Act%20v%20%20ADA.pdf.

(CRA), upon which the ADA was modeled[37] and which courts have also interpreted broadly.[38] Indeed, under the Rehabilitation Act and Title VII of the CRA, courts rarely tarried long on the question of whether the plaintiff in a case was "really a handicapped individual," or "really a woman," or "really black." Instead, these cases tended to focus on the essential causation requirement: i.e., had the individual proven that the alleged discriminatory action had been taken *because of* his or her handicap, race, or gender?[39]

B. Mitigating Measures

The Supreme Court, in a trio of cases decided in June 1999, ruled that mitigating measures – medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment – must be considered in determining whether an individual's impairment substantially limits a major life activity.[40] This was contrary to the various statements in the legislative history indicating that mitigating measures should not be taken into account.

According to the Supreme Court, a person's impairment must substantially limit the individual *in the present moment*. If medication or a device takes away that limitation in the present moment, that person has been considered by the courts as no longer "disabled" under the ADA. So, according to some recent court decisions:

- If you are fired from your job because you need a half-hour lunch break to take insulin for your diabetes, but that insulin helps you effectively manage your diabetes, you may not challenge the discrimination because you are not considered "disabled" within the meaning of the ADA.[41]
- If you are fired from your job a few months after experiencing a seizure at work, but your epilepsy is otherwise well-managed with anti-seizure medication,

[37] 42 U.S.C. § 12101 (2007) ("[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.").
[38] *See, e.g.,* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 381 (1977) (Marshall and Brennan, JJ., concurring in part and dissenting in part) ("Title VII is a remedial statute designed to eradicate certain invidious employment practices . . . [and], under longstanding principles of statutory construction, the Act should be given a liberal interpretation." (internal quotation marks and citation omitted)).
[39] Feldblum, *Definition of Disability*, *supra* note 19, at 106.
[40] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
[41] Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002).

you may not challenge the discrimination because you are not considered "disabled" within the meaning of the ADA.[42]

► If you are hospitalized because of heart disease and are subsequently fired from your job, but your heart disease is well-managed with medication, you may not challenge the discrimination because you are not considered "disabled" within the meaning of the ADA.[43]

► If you are fired by your employer because of a hearing impairment, but you wear a hearing aid that helps correct that impairment, you may not challenge the discrimination because you are not considered "disabled" within the meaning of the ADA.[44]

► If you have major depression and PTSD that are well-managed through medication, you may not challenge a termination that you believe was related to those grounds because you are not considered "disabled" under the ADA.[45]

► If you are fired because an examining physician determines that your clinical depression disqualifies you from a job, but you have successfully managed your condition with medication for over fifteen years, you may not challenge the discrimination because you are not considered "disabled" under the ADA.[46]

As demonstrated by these decisions, the Supreme Court's requirement that courts consider mitigating measures has created an unintended paradox: people with serious health conditions like epilepsy and diabetes, who are fortunate enough to find treatment that makes them more capable and independent, and thus more able to work, may find they are not protected by the ADA at all because limitations arising from their impairments are not considered substantial enough. Ironically, the better a person manages his or her medical condition, the less likely that person is to be protected from discrimination, even if an employer admits that he or she dismissed the person *because of* that person's (mitigated) condition.

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[42] Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999).
[43] Epstein v. Kalvin-Miller International, Inc., 100 F. Supp. 2d 222, 223 (S.D.N.Y. 2000).
[44] Eckhaus v. Consolidated Rail Corp., No. Civ. 00-5748(WGB), 2003 WL 23205042 (D.N.J. Dec. 24, 2003).
[45] Schriner v. Sysco Food Serv., No. Civ. 1CV032122, 2005 WL 1498497 (M.D.Pa. June 23, 2005).
[46] McMullin v. Ashcroft, 337 F. Supp. 2d 1281 (D. Wyo. 2004).

C. Broad Range of Jobs Under "Regarded as" Prong

Despite Congress' citation to *Arline* as an example of the broad coverage that Congress expected to see under the "regarded as" prong of the definition of disability, the Supreme Court in *Sutton v. United Airlines* ruled that an employer's decision to deny an individual a given job based on a perceived impairment was not sufficient to establish that the employer *regarded* the individual as substantially limited in the major life activity of *working*. Rather, in order to be covered under the third prong, the individual was now required to prove that the employer thought that the individual was incapable of performing *a class or a broad range of jobs*.[47] This was contrary to statements in the committee reports indicating that coverage under the third prong of the definition did not depend on how employers might act or think.[48]

The new formulation created by the Supreme Court erects an almost impossible threshold for any individual seeking coverage under this prong. The approach requires that an individual essentially both divine and prove an employer's subjective state of mind. Not only must an individual demonstrate that the employer believed the individual had an impairment that prevented him or her from working for that employer in that job, the individual must also show that the employer thought that the impairment would prevent the individual from performing a broad class of jobs for other employers. As it is safe to assume that employers do not regularly consider the panoply of other jobs that prospective or current employees could or could not perform – and certainly do not often create direct evidence of such considerations – the individual's burden becomes essentially insurmountable.

So, according to some recent court decisions:

► If you have twenty years' experience as an offshore crane operator and you are not hired solely because your employer believes that you are incapable of performing the job based on your two prior back surgeries, the ADA does not

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[47] *Sutton*, 527 U.S. at 493.

[48] As the House Committee on the Judiciary Report put it: "[A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field, and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition." H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

protect you unless you can show that your employer believed that you were incapable of performing a *broad range of jobs* – not just the job for which you were applying.[49]

► If you are not hired solely because your employer believes that you are incapable of performing the job based on your use of certain prescription drugs, the ADA does not protect you unless you can show that your employer believed that you were incapable of performing a *broad range of jobs* – not just the job for which you were applying.[50]

As the various examples under these three different categories of legal analysis demonstrate, the Supreme Court and the lower courts have dramatically changed the meaning of "disability" under the ADA over the past number of years so as to make it almost unrecognizable. Many of the very people whom Congress intended to protect are finding that they are not "disabled" under the ADA; they are never even given the opportunity to show they can do the job and were treated unfairly because of their medical condition.

But how did this happen? How did a statutory definition that Members of Congress and disability rights advocates felt would ensure protection for a broad range of individuals end up becoming the principal means of restricting coverage under the ADA?

There is a range of academic literature on this question, including some to which I have contributed. But let me point out here simply one observation. From my reading of the cases, it seems to me that the instinctive understanding by many courts of the term "disability" is that it is synonymous with an "inability to work or function," and concomitantly, that people with disabilities are thus necessarily viewed as significantly different from "the rest of us."

This view of disability may have been influenced by the fact that most disability cases heard by courts prior to the ADA regarded claims for disability payments under Social Security. In those cases, an individual was required to demonstrate that he or she had a "medically determinable physical or mental impairment" that made him or her

[49] E.E.O.C. v. HBH Inc., No. Civ.A. 98-2632, 1999 WL 1138533 (E.D.La. Dec. 9, 1999).
[50] E.E.O.C. v. J.B. Hunt Transport, Inc., 321 F.3d 69 (2d Cir. 2003).

unable "to engage in any substantial gainful activity" – i.e., that he or she was unable to work.[51] Hence, it may have been difficult for courts to grasp that the Congressional intent under the ADA was to capture a much broader range of individuals with physical and mental impairments than those intended to be covered under Social Security disability law.[52]

This may help to explain the mitigating measures analysis. Under Social Security disability law – when a court is determining whether someone should get *disability payments* because the person's impairment makes him or her *unable to work* – it can matter a great deal whether the impact of the person's impairment has been mitigated through medication or devices, and whether the impairment, as treated, still impacts a person's ability to work.

But a civil rights law is very different. The goal of the ADA is to prohibit *discrimination* against a person because of his or her disability. A person does not have to be unable to work in order to face discrimination based on his or her impairment. On the contrary, people who are perfectly able to perform their jobs – sometimes thanks to the very medications or devices they use – are precisely the ones who may face discrimination because of myths, fears, ignorance, or stereotypes about their medical conditions.

Similarly, in a civil rights context, requiring a person to meet an extremely high standard for qualifying as "disabled" is counter-intuitive if an employer has taken an adverse action based on an individual's physical or mental impairment. Requiring the person to reveal private, highly personal, and potentially embarrassing facts to employers and judges about the various ways the individual's impairment impacts daily living, simply and only to demonstrate the severity of the impairment, is completely unnecessary to deciding whether unjust discrimination has occurred.[53]

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[51] 42 U.S.C. § 423(d)(1)(A) (2007) (SSDI); 42 U.S.C. § 1382c(a)(3)(A) (2007) (SSI).

[52] *See* Feldblum, *Definition of Disability*, *supra* n. 17, at 97, 140.

[53] As I also note in my academic article, there are other elements that are in play here. For example, "EEOC regulations that emphasize individualized assessments of the impact of impairments on particular individuals, a sophisticated management bar trained in seminars to carefully parse the statutory text of the definition, and finally, the terms of the definition itself, have all resulted in a reading of the ADA that has radically reduced the number of people who can claim coverage under the law." Feldblum, *Definition of Disability*, *supra* n. 19, at 140; *see also id.* at 152 ("[W]hile individualized assessments are . . . critical in determining whether an individual with a disability is qualified for a job (including whether a reasonable accommodation is due to an individual in a particular case), the idea that an individualized assessment

Finally, it is inconsistent with a civil rights law to excuse an employer's behavior simply because other employers may not also act in a similar discriminatory fashion. As the court made clear in *Arline*, if an employer fires an individual expressly because of an impairment, that is sufficient to establish coverage for the individual under the "regarded as" prong of the definition of disability. Of course, an action of this nature would not suffice to qualify an individual for *disability payments*. But it certainly is sufficient to raise a viable claim of discrimination based on that impairment, regardless of whether other employers would have discriminated against the individual as well.

IV. How the ADA Restoration Act Restores Congressional Intent

As the Honorable Steny Hoyer stated when he and the Honorable Jim Sensenbrenner introduced the ADA Restoration Act of 2007 on July 26, 2007, "the point of the ADA is not disability; it is the prevention of wrongful and unlawful discrimination."[54] Courts and lawyers have spent an exorbitant amount of time and resources parsing the question of whether a person is really "disabled," when the real question should be whether a person has been treated unfairly on the basis of an irrelevant personal characteristic (disability).

The ADA Restoration Act fixes this problem by focusing a court's attention on the *reason* for the adverse action, rather than on a person's physical or mental condition, and reminding courts that – as with any other civil rights law – the ADA must be interpreted fairly and as Congress intended. The bill does this in two primary ways:

First, the bill removes the phrase from the definition of "disability" – "substantially limits a major life activity – that courts have latched onto as the basis for a restrictive reading of coverage under the ADA. In its place, the bill defines the terms "physical impairment" and "mental impairment" along the lines traditionally used by the regulatory agencies. As a further precautionary measure, the bill adds a rule of construction

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would be used to determine whether one person with epilepsy would be covered under the law, while another person with epilepsy would not, was completely foreign both to Section 504 jurisprudence and to the spirit of the ADA as envisioned by its advocates. The words of the ADA, however, can lend themselves to such an interpretation, and the fact that the EEOC's guidance expressly endorsed such an interpretation has cemented that approach in the courts.").

[54] Press Release, Congressman Steny Hoyer, Hoyer Introduces Americans With Disabilities Restoration Act of 2007 (July 26, 2007),
available at http://hoyer.house.gov/Newsroom/index.asp?ID=955&DocumentType=Press+Release.

prohibiting courts from considering whether a person uses mitigating measures or considering whether the manifestations of an impairment are "episodic, in remission, or latent" when determining if a person has an impairment.

This change to the definition of "disability" – while different in terms of *words* from the language in the original ADA – will actually restore the original *intent* of Congress in terms of coverage under the law. The new definition ensures that individuals with a wide range of physical or mental impairments are covered under the law – and are provided legal redress ***if*** *they have been subjected to discrimination* <u>*because of*</u> *a physical or mental impairment*. This last point is key. As with any other civil rights law, any individual claiming discrimination must *bear the burden of proof* that the discriminatory action was taken *because of* the impairment. This legal requirement ensures that the individuals Congress wanted to protect under the original ADA will be the ones protected under the ADA Restoration Act.

Second, the bill modifies the general section prohibiting discrimination to frame the section as prohibiting discrimination "on the basis of disability," rather than the existing formulation that prohibits discrimination "against a qualified individual with a disability" in that section. This change brings the ADA into conformity with the Civil Rights Act of 1964, which similarly prohibits discrimination "on the basis of" race, sex, religion, and other characteristics. This formulation ensures that courts begin their analysis by focusing on whether a person has proven that a challenged discriminatory action was taken *because of* a personal characteristic – in this case, disability – and not on whether the person has proven the existence of various complicated elements of the characteristic.

Despite some stated concerns, this change does *not* change the right of an employer to defend a claimed discriminatory action on the grounds that a particular applicant or employee does not have the requisite qualifications for the job. The ADA Restoration Act does not change the existing definitions provision of the ADA – 42 U.S.C. § 12111 – which provides that a "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, *can perform the essential functions of the employment position that such individual holds or desires.*"

V. Conclusion

Mr. Chairman, it is unfortunate that the words adopted by Congress in the ADA to define "disability" so easily lent themselves to the restrictive approach adopted by the lower courts. Congress' intent was crystal clear when it passed the ADA. Unfortunately its words were not. Too many people whom Congress intended to protect have had their ADA claims dismissed because they have been found by the courts not to be sufficiently "disabled" under the courts' misguided interpretation of the definition of disability under the ADA. The ADA Restoration Act of 2007 fixes this problem by restoring the intent and protections of the original ADA.

Mr. NADLER. Before recognizing myself for 5 minutes to begin the questioning, I will simply note the very welcome presence of Congressman Sensenbrenner, the former Chairman of this Committee, who is a Member of the Committee but not of the Subcommittee. And we welcome him to this hearing.

Let me begin by recognizing myself for 5 minutes and ask Professor Feldblum first, Mr. Lorber expressed concern that the bill would mean that a plaintiff would no longer have to show that he or she is qualified for a job, that the burden would shift. Do you think this is a valid concern? Does the bill do that?

Ms. FELDBLUM. I do not believe this is a valid concern at all. The bill does not change the fact that a person has to be a qualified person with a disability. It does not change the fact that a qualified person with a disability means someone who, with or without reasonable accommodations, can do the essential functions of the job. It does not change the provision in the act that says that an employer may offer as a valid qualification standard, as a defense, a valid qualification standard, that screens out or attempts to screen out a person with a disability.

I think it is simply a misreading of the bill.

Mr. NADLER. Thank you.

Mr. Lorber, you heard Mr. Orr's testimony and you know his situation. Do you think that the Court was correct in saying that in such a situation, because his diabetes is controllable, he does not deserve the protections of this act and therefore can be fired because he doesn't get the protections of the act? And do you think that this bill, that we should correct that? And if not, why not? And if yes, why?

Mr. LORBER. Thank you, Mr. Chairman.

There are a lot of cases, people win cases and people lose cases. There is a case, *Lawson v. CSX.*

Mr. NADLER. Wait a minute. Let's stick to Mr. Orr——

Mr. LORBER. It will address——

Mr. NADLER [continuing]. Because I want to use that as a type case.

Mr. LORBER. Well, *Lawson* was a diabetes case. It was in the 7th Circuit. The plaintiff won the case. And that is cited in my testimony, and indeed we did provide to counsel a list of cases where plaintiffs won.

The point is that Mr. Orr, as any case, has facts that may or may not be unique to those cases. Whether or not diabetes should be deemed a disability, *Sutton* implies that it certainly can, the *Lawson* case said it should. So that I don't know that it is very productive to look at cases won and cases lost. Rather, I think we can look to what the impact——

Mr. NADLER. Wait a minute. Let me interrupt you right there.

In looking at the results of any law, you have to look at the cases won and the cases lost to figure out what the law is doing. And I am frankly at a loss to interpret that last statement——

Mr. NADLER [continuing]. What?

Mr. LORBER. We can look at cases where——

Mr. NADLER. Yes, but I am told that in 97 percent of the cases under the Disability Act now the plaintiff loses.

Mr. LORBER. Well, that figure, by the way, is not that dissimilar from cases under any of the civil rights laws.

The other point that we made in the testimony is that we have 17 years experience under the ADA. The assumption that no employer understands its obligations and, therefore, undertakes the reasonable accomodation, undertakes their interactive process, so that the cases that go to court are often the difficult cases. The cases that go to court are, for whatever reason. And that, I think, is the fairer number and indeed the number I talked to you about insofar as——

Mr. NADLER. Okay. Thank you very much.

Professor Feldblum, can you comment on the Orr and the Littleton cases as to, A, fundamental fairness and, B, the intent of the act?

Ms. FELDBLUM. Yes. And I think picking up actually on the 7th Circuit case that Mr. Lorber wanted to talk about, about a person with diabetes that did win, is going to be very useful for the Committee.

Mr. Orr manages, as you heard, his blood glucose levels very well. He has to take insulin several times a day, monitor his blood sugar. But if he does that, his blood glucose level is managed very well, so he remains well qualified. Okay?

The ability—that management requires an accomodation of being able to have a regularly scheduled lunch hour. This was exactly the type of thing that Congress expected when it passed the ADA, that it would be ensuring.

Take the person with diabetes who won in the 7th Circuit on the question of whether he had a disability. His blood glucose was not managed as well, okay? So even with taking insulin, he would have breakthrough moments of hypoglycemia, he would have times when, as the Court said, despite the most diligent care, there would be occasions when his ability to think coherently was significantly impaired, as well as his ability to function.

He also was trying to get a reasonable accommodation. These cases show exactly what Cheryl Sensenbrenner was trying to show. The thousands of people with diabetes who manage it well will never get a chance to ask for a reasonable accomodation. The few who really with decent management are still having breakthrough problems will be covered, but this person will potentially end up losing because he wasn't qualified.

Mr. NADLER. My time is expired and I would like to recognize Mr. Davis for 5 minutes.

We have six votes coming up, so I would like to try to conclude the hearing at that point.

Mr. DAVIS. Thank you, Mr. Chairman.

Ms. Sensenbrenner, let me just begin by complimenting you. I have always thought that I would not relish being on the other side of an argument from this half of the Sensenbrenner family. I can see I wouldn't relish being on the opposite side of you either. So I compliment you for the clarity of your testimony.

Let me just try to make a couple of quick observations, and I will take my 5 minutes and just perhaps provide a quick response from one of the witnesses.

This is a complicated statute, and the interplay is complex, and I am not going to profess that I understand it as well as I understand some of the other discrimination statutes, but this is what seems to be the case to me, that the Supreme Court has decided that the reach of this statute should essentially be the group of people least likely to recover under it. Okay, that is putting it in plain English as I can understand it. The group of people who are so severely restricted that they likely could never win a lawsuit anyway and probably couldn't function in the workplace, it seems to me, is the group of litigants that the court would allow to go forward. That doesn't make a lot of sense to me and I want to put that in some perspective.

One of the problems that some of us have with the Roberts court and with the Rehnquist court that produced this trilogy of cases described today is a very straightforward one. Both those courts have and had activist tendencies. This is the activist tendency that I would note. A tendency to, number one, look at what Congress has done and to say we think that Congress got it wrong. We think that Congress was wrong in its political judgment, so therefore we are going to substitute our political world view for Congress'.

There has been a second tendency to say, well, we think that employment discrimination statutes in general have yielded too many frivolous claims. That perhaps explains Ledbetter, Professor Feldblum. That explains some of the more restrictive interpretations of title 7 from the Rehnquist courts and the Roberts courts.

And this is what is troubling about that. The world view that there are too many frivolous lawsuits, the world view that it is too easy for people to go into court, there may or may not, Mr. Chairman, be some validity to that, but I thought it was a political judgment. And because it is a political judgment, I think the 535 of us in the Congress should get to make it and the President should get to make it. I am not comfortable with a body that is supposed to be calling balls and strikes and interpreting the plain language of statutes and interpreting congressional intent when it is manifest. I am not comfortable with that body deciding, you know what, we have a view of how the world ought to operate.

I think that that is judicial activism, and I am as troubled by it as some of my colleagues are with its practice on the left.

And I will yield back.

Mr. NADLER. Thank the gentleman.

I thank the witnesses.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as you can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, and with the thanks of the Chair, this hearing is adjourned.

[Whereupon, at 11:21 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

More than seventeen years ago, Congress passed the Americans with Disabilities Act to ensure independence and equality for people with disabilities. Our hopes and declarations for this landmark civil rights law were not timid or hollow. Our mandate was purposefully ambitious. We sought—for once and for all—to prohibit unfair discrimination based on disability.

Through this broad mandate, we intended to protect anyone who is treated less favorably because of current, past, or perceived disability. It was our hope that people with disabilities would be protected from discrimination in the same way as those who experienced discrimination on the basis of race, sex, national origin, religion, or age.

Sadly, this has not happened because the Supreme Court has failed to interpret the definition of "disability" as we intended. The Court has deviated from our intent in two significant and critically important ways.

First, the Court has construed the Act to allow it to consider the impact of "mitigating measures"—things like medicine, hearing aids, or prosthetic devices—in determining whether an individual has a "disability" under the ADA. This means that individuals who are fortunate enough to find ways to help manage their condition—and therefore are more capable and independent—may not be entitled to the Act's protections against disability discrimination because they are not considered to be "disabled enough" under the ADA.

Second, the Supreme Court has interpreted the definition of "disability" too narrowly. As a result, the standard for qualifying as "disabled" is unnecessarily difficult to meet, thereby denying critical protection to many individuals with serious health conditions who have faced disability discrimination.

We never intended—or expected—this to happen. As Mr. Orr, one of our witnesses today will explain, the ADA, as interpreted by the Court, provides little protection. Because Mr. Orr takes insulin and maintains a strict dietary regimen that help control his diabetes, the courts have held that Mr. Orr's impairment was not disabling enough and, therefore, he is not entitled to the ADA's protection from discrimination.

There are thousands of men, women, and children who—like Mr. Orr—who are being denied the protections that Congress intended the ADA to provide.

His testimony will undoubtedly underscore why H.R. 3195, the "ADA Restoration Act of 2007" is so critical. This bipartisan legislation, which I am proudly a cosponsor of, will restore our original intent and help fulfill the ADA's promise of basic equality.

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SUBMISSION FOR THE RECORD

to the

SUBCOMMITTEE ON THE

CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

of the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES HOUSE OF REPRESENTATIVES

regarding

its

LEGISLATIVE HEARING ON THE ADA RESTORATION ACT

OCTOBER 4, 2007

by

ROBERT L. BURGDORF JR.
Professor of Law
University of the District of Columbia
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INTRODUCTION

In1990, Congress and the George H.W. Bush Administration took the momentous and long-needed step of according people with disabilities protection from discrimination – the right to be treated equally and to challenge unfair treatment against them – by enacting the Americans with Disabilities Act (ADA). Today, large numbers of people with disabilities around the country find that they no longer have the rights the Congress and the President gave them. I am currently working on a law review article addressing discrimination against people with cancer; in doing research for that article, I found considerable statistical and anecdotal information documenting serious discrimination directed at people who currently have cancer and those who have previously been treated for cancer. Estimates of the prevalence of such discrimination in the workplace vary all over the board, from 5% to 90%, but considering that over 10 million people living in the United States currently have cancer or have been treated for cancer, including over two million who have been treated for breast cancer, and that about 40% of them are of working age, even the most conservative estimates mean that hundreds of thousands of Americans with cancer or a history of cancer have been discriminated against by their employers.

Many workers facing such discrimination have sought to assert their rights under the ADA. All too often, however, the courts' restrictive interpretations of the Act's coverage have resulted in judicial rulings that a worker's cancer is not a disability, much to the sad surprise of those who drafted and enacted the legislation. This means that hundreds of thousands of people who have had to battle a life-threatening disease and then encountered unfair and unnecessary discrimination may have no recourse under a law that was manifestly intended to protect them. Even those who do manage to satisfy the stringent criteria for disability can only do so by making obviously off-the-point and often embarrassing and painful showings of how their sexual activities or ability to perform personal self care or other unrelated activities are severely limited.

The article I am working on focuses on cancer, but the same situation applies to many, perhaps most, other types of disabilities. Even a cursory review of the cases decided under the ADA reveals a plethora of court decisions in which people with conditions everyone thought were covered under the law when it was enacted have had

their lawsuits thrown out of court based on technical, harshly narrow interpretations of what a "disability" is. Statistical studies pretty consistently indicate that complainants prevail in fewer than one out of ten ADA Title I (employment) complaints. One of the studies found that courts ruled that the plaintiff had a disability in only six percent of the cases.[1] Ludicrously, employers who take drastic steps, such as termination or demotion, against employees because of their conditions can successfully contend that the conditions are not serious enough to constitute a disability.

For these reasons, it is both an honor and a solemn responsibility for me to have this opportunity to submit comments to the subcommittee. In my 19 years as Professor of Law at the University of the District of Columbia, David A. Clarke School of Law, I initially taught the School's Constitutional Law courses, and for many years now have directed a clinical program in legislation – the Legislation Clinic. For over 35 years, however, my particular area of legal research and expertise has been the rights of people with disabilities. During my career, I have had the good fortune to be presented with some wonderful opportunities to contribute to the advancement of such rights. Chief among these was working for the National Council on Disability during the Administration of George H.W. Bush to develop the concept of an Americans with Disabilities Act (ADA) and then to craft the Council's original version of the ADA. This is the version that Representative Tony Coelho and Senator Lowell Weicker had the vision and valor to introduce in the 100th Congress in 1988.

I subsequently worked with Members of Congress and their staffs, legal experts, and representatives of affected industries to revise the ADA bill for introduction in the 101st Congress in 1989. Joined by many of his colleagues on both sides of the aisle, Representative Coelho again took a leadership role by sponsoring the legislation in the House. In October of 1989, I had the highly gratifying occasion of testifying before the predecessor of this subcommittee – on Civil and Constitutional Rights, as it was then known – during its consideration of the ADA. In addition to discussing some of the merits of the legislation generally, I testified about the prevalence of discrimination against people with disabilities in public accommodations and the need for a prohibition of discrimination by such facilities, explained some of the bill's standards for eliminating

such discrimination, and listed many of the numerous accommodations the legislation made for the needs of small businesses.

After the ADA was enacted in 1990, I had the opportunity to do some scholarly writing, including a hefty legal treatise and several law review articles, that discussed the provisions of the ADA and the court decisions that started to arise under it. I also had occasion to continue to work with the National Council on Disability (NCD) in monitoring the case law and federal enforcement efforts regarding the ADA. At the Council's request, I developed a summary of the Supreme Court's ADA decisions and their implications that is posted on the NCD website at http://www.ncd.gov/newsroom/publications/2002/supremecourt_ada.htm.

During the Administration of George W. Bush, the NCD focused on the digression of some of the Supreme Court's decisions from the intent and spirit of the ADA, and decided to undertake an in-depth study of the impact of these decisions, consistent with NCD's statutory obligation to "gather information about the implementation, effectiveness, and impact of the Americans with Disabilities Act of 1990."2 The Council commissioned a series of policy documents discussing specific topics raised by problematic Supreme Court ADA decisions; 19 such topic papers have been issued to date. They are posted on the NCD website under the title Policy Brief Series: Righting the ADA Papers at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

Based upon information uncovered in the development of these topic papers, NCD became convinced that corrective legislative action is called for, and accorded me the high honor of asking me to pull together the various strands and issues discussed in the individual topic papers and to draft a unified legislative proposal for getting the ADA back on track. The result, a report titled *Righting the ADA*, was issued in December of 2004. It provides an analysis of problematic Court rulings, describes the resulting impact on people with disabilities, and offers legislative proposals designed to restore the ADA to its original intent. Out of various legislative proposals discussed in the report, NCD chose to consolidate its preferred solutions to the problems created by judicial misinterpretation of the ADA into a single draft bill – the ADA Restoration Act.

NCD has sent copies of the *Righting the ADA* report to Congress, additional copies are available from the National Council, and the report is posted on the NCD website at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm. For convenience, however, I am including as the final section of my observations the Executive Summary of the *Righting the ADA* report, which includes a Section-by-Section Summary and the text of the Council's ADA Restoration Act proposal. I will only add a caution that the full text of the report contains considerable materials clarifying, explaining, and amplifying the impact of the ADA decisions of the Supreme Court and I strongly advise those interested in the proposals to read the full rationale that supports them. Much of the remainder of my comments is derived more or less directly from the *Righting the ADA* report, the series of topic papers that led up to it, and other NCD reports that I helped develop.

BROAD BIPARTISAN SUPPORT

President George H.W. Bush called July 26, 1990, "an incredible day…an immensely important day," for on that date he signed into law the Americans with Disabilities Act (ADA). In his remarks at the signing ceremony, the President described the Act as an "historic new civil rights Act, ... the world's first comprehensive declaration of equality for people with disabilities." He added that "[w]ith today's signing of the landmark Americans with Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom." He also noted that "my administration and the Congress have carefully crafted this Act."

A rarity about the ADA was that it was an important piece of legislation that almost everyone supported. The votes in Congress to pass the ADA were overwhelmingly in favor of passage. The Senate passed its version of the ADA bill by a vote of 76 to 8; the House of Representatives passed its bill 403 to 20. After differences were ironed out in conference, the House approved the final version of the bill by a vote of 377 to 28, and the Senate followed suit, adopting the final ADA bill by the lopsided margin of 91 to 6. Congressional committees that considered the ADA were equally united in their backing of the legislation. Two of the five committees—the Senate Labor

and Human Resources Committee and the House Committee on Education and Labor—adopted ADA bills unanimously. The Subcommittee on Civil and Constitutional Rights favorably reported the bill by a recorded vote of 7-1, and the House Judiciary Committee followed suit by a recorded vote of 32-3. None of the formal up-or-down committee votes on reporting out the ADA, nor any of the floor votes on passage of the legislation, had less than a 90 percent majority in favor of the ADA bills.

Such overwhelming approval of a measure—with at least 9 out of 10 voting for it—obviously can occur only if it has both Republican and Democratic support. The ADA originated, as Senator Robert Dole, the Senate minority leader emphasized, "with an initiative of the National Council on Disability, an independent federal body composed of 15 members appointed by President Reagan and charged with reviewing all laws, programs, and policies of the Federal Government affecting individuals with disabilities." Proposed by Reagan appointees, initially sponsored by a Republican in the Senate (Senator Lowell Weicker) and a Democrat in the House of Representatives (Representative Tony Coelho), passed by a Democrat-controlled Senate and House of Representatives, and supported and signed by President George H.W. Bush, the ADA was a model of bipartisanship.

Before the ADA was reintroduced in the 101st Congress, ADA advocates in Congress determined that, to pass an effective and enforceable law, they needed the support of the administration and members of Congress from both major political parties. As Congressman Coelho would later report, "If it had become a Democratic bill, [the ADA] would have lost.... It had to be bipartisan." As the ADA passed the Senate, Senator Dole called it "a good example of bipartisanship in action." Likewise, President George H.W. Bush credited the success of the ADA to the fact that members of Congress, "on both sides of the political aisle" agreed to "put politics aside" to "do something decent, something right." He credited the ADA's passage to "a coalition in the finest spirit. A joining of Democrats and Republicans. Of the Legislative and the Executive Branches. Of federal and state agencies. Of public officials and private citizens. Of people with disabilities and without."

Members of both political parties participated in cooperative meetings to craft compromise provisions and revise problematic language in the bills. Republican

Representative Steve Bartlett described meetings with the leading House advocate for the ADA, Democrat Steny Hoyer, as "the most productive and satisfying legislative negotiations that I had ever been involved with."

In addition to congressional dialogue and bargaining, a key factor in obtaining bipartisan backing and ultimately passing the ADA was the unwavering support for the legislation by President George H.W. Bush and his administration. While he was Vice President, Mr. Bush had pledged that he would promote a civil rights act for people with disabilities. Two days before his inauguration as President, Mr. Bush declared, "I said during the campaign that disabled people have been excluded for far too long from the mainstream of American life. ... One step that I have discussed will be action on the Americans with Disabilities Act in order, in simple fairness, to provide the disabled with the same rights afforded others, afforded other minorities." Early in the Senate hearings on the ADA, Senator Tom Harkin, a Democrat, made a remarkable statement crediting President George H.W. Bush's public remarks in favor of rights for people with disabilities:

> [W]e have had strong, strong statements made by President Bush—no President of the United States, Republican or Democrat, has ever said the things about disabled Americans that George Bush has said. No President, including the President who was in a wheelchair, Franklin Roosevelt.

Senator Harkin concluded that "this bodes well" and meant that "we can work together with the administration, [on] both sides of the aisle..." on the ADA.

Attorney General Dick Thornburgh formally announced the Bush administration's support for the ADA during Senate hearings on the legislation. He declared, "[w]e at the Justice Department wholeheartedly share [the ADA's] goals and commit ourselves, along with the President and the rest of his administration to a bipartisan effort to enact comprehensive legislation attacking discrimination in employment, public services, transportation, public accommodations, and telecommunications." He added, in regard to the ADA bill, that "[o]ne of its most impressive strengths is its comprehensive character" that was consistent with President George H.W. Bush's commitment to ensuring people with disabilities' "full participation in and access to all aspects of society." After Administration and Senate advocates ironed out differences on specific provisions, the

Administration's express endorsement of the legislation led to a unanimous Senate Committee vote to report the bill out of committee, and to more than 60 Senators signing on as cosponsors. It also set the stage for favorable House action and final passage of the ADA.

As the ADA passed the Senate, Senator Dole praised President George H.W. Bush for his leadership on the legislation, and declared that "[w]e would not be here today without the support of the President." The senator credited a list of administration officials, including Chief of Staff John Sununu and Attorney General Dick Thornburgh, whose efforts contributed to the passage of the ADA. He also appended to his remarks a *New York Times* opinion-editorial piece about the ADA written by James S. Brady, who had been President Reagan's Press Secretary. Mr. Brady wrote:

> As a Republican and a fiscal conservative, I am proud that this bill was developed by 15 Republicans appointed to the National Council on Disability by President Reagan. Many years ago, a Republican President, Dwight D. Eisenhower, urged that people with disabilities become taxpayers and consumers instead of being dependent upon costly federal benefits. The [ADA] grows out of that conservative philosophy.

NCD has observed:

> More than any other single player, the role of President Bush cannot be overestimated. The ADA would have made little headway were it not for the early and consistent support from the nation's highest office. ...The president's support brought people to the table to work out a bipartisan compromise bill that could obtain the support of the business community as well as that of the disability community.[3]

Acclaim for the ADA came from many other sources. Senator Dole called the ADA "landmark legislation" that would "bring quality to the lives of millions of Americans who have not had quality in the past." Senator Hatch declared the ADA was "historic legislation" whose passage was "a major achievement" demonstrating that "in this great country of freedom, ... we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society." The executive director of the Leadership Conference on Civil Rights described the ADA as "the most

comprehensive civil rights measure in the past two-and-a-half decades." Senator Edward M. Kennedy termed the legislation a "bill of rights" and "an emancipation proclamation" for people with disabilities. The late Justin Dart, who occupied disability policy positions in the Reagan, Bush, and Clinton administrations, called the ADA "a landmark commandment of fundamental human morality."

BACKING BY SUBSEQUENT PRESIDENTS

In 2000, President Bill Clinton proclaimed July as "The Spirit of the ADA Month" and declared:

> The enactment of the Americans with Disabilities Act 10 years ago this month signaled a transformation in our Nation's public policies toward people with disabilities. America is now a dramatically different—and better—country because of the ADA.

In addition to citing past accomplishments and pending initiatives his administration was pursuing to further the implementation of the ADA, President Clinton added, "Vice President Gore and I are proud to join in the celebration and to renew our own pledge to help advance the cause of disability rights." For his part, Vice President Al Gore observed, "We know we can't just pass a few laws and change attitudes overnight. But day by day, person by person, we can make a difference. Together, let's not just complete the work of the ADA—let's say to the whole world: this is one country that knows we don't have a person to waste, and we're moving into the next century—together."[4]

Bipartisan support and presidential commitment to the ADA have continued. President George W. Bush endorsed the Act and, in February 2001, issued his "New Freedom Initiative," committing his administration to ensuring the rights and inclusion of people with disabilities in all aspects of American life. On June 18, 2001, President Bush issued Executive Order No. 13217, declaring the commitment of the United States to community-based alternatives for individuals with disabilities. On the twelfth anniversary of the signing of the ADA, July 26, 2002, the President proclaimed the ADA to be "one of the most compassionate and successful civil rights laws in American history."[5] The White House also declared that "[t]he administration is committed to the

full enforcement of the Americans with Disabilities Act." President Bush asserted a clear continuity between his commitment to the ADA and that of his father:

> [W]hen my father signed the ADA into law in 1990, he said, "We must not and will not rest until every man and woman with a dream has the means to achieve it." Today we renew that commitment, and we continue to work for an America where individuals are celebrated for their abilities, not judged by their disabilities.

WILL OF THE PEOPLE

In enacting the ADA and in seeking its vigorous enforcement, the elected branches of the Federal Government—the Congress and the President—have carried out the will of the American people. A large majority of the public reports that it favors the ADA. A 2002 Harris Poll found that, of the 77 percent of Americans who said they were aware of the ADA, an overwhelming percentage (93 percent) reported that they "approve of and support it." The ADA is supported by most of the business sector. A Harris Poll of business executives in 1995, for example, showed that 90 percent of the executives surveyed said that they supported the ADA.

In the face of negative media reports on the ADA (often misleading and sometimes flatly inaccurate), most Americans are still highly favorably disposed to the Act. They have had experience with the realities of the ADA in their communities and workplaces, and have seen how people have benefited from it. They have noticed people with visible disabilities at stores, malls, theaters, stadiums, and museums. They have seen the ramps, accessible bathrooms, disabled parking spaces, and other accessibility features that the ADA has engendered. They encounter people who use wheelchairs now able to go to department stores, fast food places, and government offices. They know that the son of their neighbors is now living comfortably in an apartment in the neighborhood with appropriate support services instead of in an institutional setting. They are aware that sign language interpreters now are routinely present at their county council meetings. In these and countless other ways, they have seen the ADA in action, and they approve.

IMPACT OF THE ADA

In a variety of ways, the ADA has lived up to the high hopes that accompanied its passage. The provisions of the ADA that address architectural, transportation, and communication accessibility have changed the face of American society in numerous concrete ways. A vast number of buildings and other structures have been affected by provisions of the ADA that make it illegal to design or construct any new place of public accommodation or other commercial facility without making it readily accessible to and usable by people with disabilities, or to alter such a facility without incorporating accessibility features. The ADA's mass transit provisions ended decades of disagreements and controversy regarding many of the issues that determined exactly what is required of public transportation systems to avoid discriminating on the basis of disability. The ADA contains detailed provisions describing requirements for operators of bus, rail, and other public transportation systems, and intercity and commuter rail systems. Although implementation has been far from perfect and ADA provisions do not answer all the questions, much progress in transportation accessibility has been made. The ADA's employment provisions have dramatically affected hiring practices by barring invasive preemployment questionnaires and disability inquiries and the misuse of preemployment physical information. These provisions also have made job accommodations for workers with disabilities more common than they were before the ADA was enacted. The ADA's telecommunications provisions have resulted in the establishment of a nationwide system of relay services, which permit the use of telephone services by those with hearing or speech impairments, and a closed captioning requirement for the verbal content of all federally funded television public service announcements.

Other provisions of Title II of the ADA (covering state and local governments) and Title III (covering public accommodations) have eliminated many discriminatory practices by private businesses and government agencies. The ADA has had a particularly strong impact in promoting the development of community residential, treatment, and care services in lieu of unnecessarily segregated large state institutions and nursing homes. The Act provided the impetus for President George W. Bush's "New Freedom Initiative," issued in February 2001, committing his administration to assuring the rights and inclusion of people with disabilities in all aspects of American life; and for

Executive Order No. 13217, issued on June 18, 2001, declaring the commitment of the United States to community-based alternatives for people with disabilities.

At the ADA signing ceremony, the first President Bush declared that other countries, including Sweden, Japan, the Soviet Union, and each of the 12 member nations of the European Economic Community, had announced their desire to enact similar legislation. In the years since its enactment, numerous other countries have been inspired by the ADA to seek legislation in their own jurisdictions to prohibit discrimination on the basis of disability. These countries have looked to the ADA, if not as a model, at least as a touchstone in crafting their own legislative proposals.

In 1988, while the original ADA bills were pending before Congress, the Presidential Commission on the Human Immunodeficiency Virus (HIV) Epidemic endorsed the legislation and recommended that the ADA should serve as a vehicle for protecting from discrimination people with HIV infection. The ADA has proved to be the principal civil rights law protecting people with HIV from the sometimes egregious discriminatory actions directed at them.

In a broader sense, the ADA has, as the Council has observed in a report issued in 2000, "begun to transform the social fabric of our nation":

> It has brought the principle of disability civil rights into the mainstream of public policy. The law, coupled with the disability rights movement that produced a climate where such legislation could be enacted, has impacted fundamentally the way Americans perceive disability. The placement of disability discrimination on a par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country. The ADA has become a symbol, internationally, of the promise of human and civil rights, and a blueprint for policy development in other countries. It has changed permanently the architectural and telecommunications landscape of the United States. It has created increased recognition and understanding of the manner in which the physical and social environment can pose discriminatory barriers to people with disabilities. It is a vehicle through which people with disabilities have made their

political influence felt, and it continues to be a unifying focus for the disability rights movement.[6]

This is not to ignore the fact that there are huge gaps in enforcement of the ADA's requirements or that some covered entities have taken an I-won't-do-anything-until-I'm-sued attitude toward the obligations imposed by the law. Indeed, the *Promises to Keep* report, from which the preceding quotations were taken, described a variety of problems and weaknesses in federal enforcement of the ADA and presented recommendations for remedying such deficiencies.

Numerous people with disabilities, however, have declared that the ADA has played an important role in improving their lives. In 1995, NCD issued a report titled *Voices of Freedom: America Speaks Out on the ADA*, in which it presented a large number of statements by individuals with disabilities talking about the impact of the ADA. The following is a tiny sampling of the thousands of statements NCD received:

> The ADA is fantastic. I can go out and participate. The ADA makes me feel like I'm one of the gang. (Sandra Brent, Arkansas)
>
> Even though we had the Rehab Act of 1973, it took the ADA to make real change. The ADA has given me hope, independence, and dignity. (Yadi Mark, Louisiana)
>
> Because of the ADA, I have more of the opportunities that other people have. Now I feel like a participant in life, not a spectator. (Brenda Henry, Kansas)
>
> A successful person with a disability was once thought of as unusual. Now successful people with disabilities are the rule. It's the ADA that has opened the door. (Donna Smith-Whitty, Mississippi)[7]

The report presented statements by people with disabilities about their experiences with the ADA in various aspects of their lives, including access to the physical environment, access to employment opportunities, communication mobility, and self image. The report concluded that,

> ...the actual research data and the experiences of people with disabilities, of their family members, of businesses, and of public servants, [demonstrates] that this relatively new law has begun to move us rapidly toward a society in which all Americans can live, attend school, obtain employment, be a part of a family, and be a part of a community in spite of the presence of a disability. What is needed

> now is a renewed commitment to the goals of the Act (which were crafted under unprecedented bipartisan efforts), sufficient resources to support further education and training concerning the ADA, and effective enforcement.[8]

In a similar vein, President George W. Bush declared the following in 2002:

> In the 12 years since President George H.W. Bush signed the ADA into law, more people with disabilities are participating fully in our society than ever before. As we mark this important anniversary, we celebrate the positive effect this landmark legislation has had upon our Nation, and we recognize the important influence it has had in improving employment opportunities, government services, public accommodations, transportation, and telecommunications for those with disabilities.
>
> Today, Americans with disabilities enjoy greatly improved access to countless facets of life; but more needs to be done. We must continue to build on the important foundations established by the ADA. Too many Americans with disabilities remain isolated, dependent, and deprived of the tools they need to enjoy all that our Nation has to offer.[9]

JUDICIAL RESISTANCE

In light of the overwhelming endorsement of the ADA by Congress in enacting it, by the Presidents in office at and since its enactment, and by the majority of the general public, it is surprising and disappointing that the judiciary all too often has given the Act the cold shoulder. Problematic judicial interpretations have blunted the Act's impact in significant ways. The National Council on Disability, numerous legal commentators, and large numbers of people with disabilities have become increasingly concerned about certain interpretations and limitations placed on the ADA in decisions of the U.S. Supreme Court.

This is not to suggest that all the rulings of the high court on the ADA have been negative. Among favorable decisions, the U.S. Supreme Court has (1) upheld the ADA's integration requirement and applied it to prohibit unnecessary segregation of people receiving residential services from the states; (2) held the ADA applicable to protect prisoners in state penal systems; (3) held that the ADA prohibits discrimination by a

dentist against a person with HIV infection; (4) ruled that the ADA required the PGA to allow a golfer with a mobility impairment to use a golf cart in tournament play as a "reasonable modification"; and ruled that the ADA protects the rights of people with disabilities to have access to the courts. But while not all of the Court's ADA decisions are objectionable, those that are have had a serious negative impact. They have placed severe restrictions on the class of persons protected by the ADA, have narrowed the remedies available to complainants who successfully prove violations of the Act, have expanded the defenses available to employers, and have even called into question the very legality of some parts of the Act. NCD's policy paper, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*, explores the effect such decisions have had on individuals with disabilities. Paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

Media coverage of the Court's ADA decisions has made matters worse. While such coverage has not been uniformly negative, a significant portion of it has been misleading, presenting the Act in a highly unfavorable light and placing a negative "spin" on the ADA, the court decisions interpreting it, and its impact on American society. NCD's extensive and detailed policy paper, *Negative Media Portrayals of the ADA*, discusses prevalent media-fed myths about the ADA. Paper No. 5 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

Inhibitive court decisions combined with harmful media perspectives have caused the ADA to be the object of frequent misunderstanding, confusion, and even derision. The detrimental pronouncements of the courts and negative impressions of the ADA fostered by media mischaracterizations have fed on one another and have generated increasing misunderstandings of the Act's underlying purposes and vision, frustrated some of its central aims, and narrowed the scope and degree of its influence.

PROBLEMATIC INTERPRETATIONS OF THE ADA

A. Surprising Problems with the Definition of Disability

When Congress passed the ADA and President George H.W. Bush signed it into law, hardly anyone expected trouble in the courts with the definition of disability. Congress played it safe by adopting in the ADA a definition of disability that was the same as the definition of "handicap" under the Rehabilitation Act. That definition was enacted in 1974 and clarified in regulations issued under Section 504 of the Rehabilitation Act. Because the definition was a broad and relatively uncontroversial one, defendants seldom challenged plaintiffs' claims of having a disability.[10] In 1984, a federal district court noted that, after 10 years' experience with the Rehabilitation Act definition, only one court found a Section 504 plaintiff not to have a "handicap."[11]

In 1987, the U.S. Supreme Court made it abundantly clear that the definition of "handicap" under Section 504 was very broad. In *School Board of Nassau County v. Arline*, the Court took an expansive and nontechnical view of the definition. The Court found that Ms. Arline's history of hospitalization for infectious tuberculosis was "more than sufficient" to establish that she had "a record of" a disability under Section 504 of the Rehabilitation Act. The Court made this ruling even though her discharge from her job was not because of her hospitalization. The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted that, in establishing the new definition of disability in 1974, Congress had expanded the definition "so as to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"

The Court declared that the "basic purpose of Section 504" was to ensure that individuals "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others" or "reflexive reactions to actual or perceived [disabilities]" and that the legislative history of the definition of disability "demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual." The Court elaborated as follows:

> Congress extended coverage ... to those individuals who are simply "regarded as having" a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection "a person with

> some kind of visible physical impairment which in fact does not substantially limit that person's functioning." Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

When Congress was considering the ADA, the Supreme Court's decision in *School Board of Nassau County v. Arline* was the leading legal precedent on the definition of disability. The *Arline* ruling was expressly relied on in several ADA committee reports discussing the definition of disability, including the report of the House Judiciary Committee, which quoted the exact language of the Court as set out above.[12]

This was the legal background when Congress adopted the essentially identical definition of disability in the ADA. To further ensure that the definition of disability and other provisions of the ADA would not receive restrictive interpretations, Congress included in the ADA a provision requiring that "nothing" in the ADA was to "be construed to apply a lesser standard" than is applied under the relevant sections of the Rehabilitation Act, including Section 504, and the regulations promulgating them. In his remarks at the ADA signing ceremony, President George H.W. Bush pointed with pride to the ADA's "piggybacking" on Rehabilitation Act language:

> The administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. The Rehabilitation Act standards are already familiar to large segments of the private sector that are either federal contractors or recipients of federal funds. Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act.

Accordingly, at the time of the ADA's enactment, it seemed clear that most ADA plaintiffs would not find it particularly difficult to establish that they had a disability. NCD issued two policy papers that discuss the care with which the ADA definition of disability was selected and the breadth of that definition. *A Carefully Constructed Law* and *Broad or Narrow Construction of the ADA*, papers No. 2 and No. 4, respectively, of

NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

For some time after the ADA was signed into law, the pattern of broad and inclusive interpretation of the definition of disability, established under Section 504, continued under the ADA. In 1996, a federal district court declared that "it is the rare case when the matter of whether an individual has a disability is even disputed."[13] As some lower courts, however, began to take restrictive views of the concept of disability, defendants took note, and disability began to be contested in more and more cases.

Beginning with its decision in *Sutton v. United Airlines* in 1999, the U.S. Supreme Court started to turn its back on the broad, relaxed interpretation of disability endorsed by the Court in the *Arline* decision. By the time of the *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* decision in 2002, the Court was espousing the view that the definition should be "interpreted strictly to create a demanding standard for qualifying as disabled." This stance is directly contrary to what the Congress and the President intended when they enacted the ADA.

The result of the Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination. The focus of many time-consuming and expensive legal battles is on the characteristics of the person subjected to discrimination rather than on the alleged discriminatory treatment meted out by the accused party. The ADA was intended to regulate the conduct of employers and other covered entities, and to induce them to end discrimination. To the extent that these parties can divert the focus to a microscopic dissection of the complaining party, central objectives of the law are being frustrated.

Other governments and judicial forums have rejected the Supreme Court's restrictive interpretation of disability. Thus, courts in the individual states[14] and in other countries[15] have embraced more inclusive interpretations of who has a disability under nondiscrimination laws. And legislatures in the states[16] and in other countries[17] deliberately have rejected the narrow approach under U.S. law as enunciated in the Supreme Court's decisions.

B. Specific Problems with the Interpretation of Disability

In its *Righting the ADA* report, the National Council on Disability described nine issues to which the Supreme Court's narrow approach to the definition of disability in the ADA had led it to deviate from the legislative intent with harmful consequences. These issues were:

(1) Consideration of Mitigating Measures in Determining Disability,

(2) Substantial Limitation of a Major Life Activity,

(3) Employment as a Major Life Activity,

(4) The "Class or Broad Range of Jobs" Standard,

(5) "Regarded As" Having a Disability,

(6) Validity of and Deference to Be Accorded Federal Regulations Implementing the ADA 's Definition of Disability,

(7) Duration Limitation on What Constitutes a Disability,

(8) Per Se Disabilities, and

(9) Restrictive Interpretation of the Definition of Disability to Create a Demanding Standard.

In regard to each of these issues, the report describes "What the Supreme Court Did," analyzes the "Significance of the Court's Action," and gives specific "Examples of Impact" of the rulings. A subsequent section of the report, titled "Principles and Assumptions Regarding the Definition of Disability When the ADA Was Enacted That Have Been Disregarded or Contradicted by the Supreme Court" presents 11 important ways in which the Court's ADA definitions decisions deviate from expectations in place when the ADA was negotiated debated and enacted. For the sake of brevity, that information is not reiterated here, but the discussion of one of the issues -- mitigating measures -- that follows hopefully exemplifies the kinds of serious problems the Court's approach to the definition has caused.

Before the Supreme Court upset the applecart, all the relevant authorities were nearly unanimous in the view that mitigating measures should not be considered in

deciding whether a person has a disability under the ADA. Even before the ADA was enacted, the committee reports on the pending legislation declared clearly that mitigating measures should not be factored in. The three ADA Committee Reports that addressed the issue all concurred that mitigating measures are not to be taken into account when determining whether an individual has a disability. The House Committee on the Judiciary declared unequivocally that "[t]he impairment should be assessed without considering whether mitigating measures ... would result in a less-than-substantial limitation."[18] To illustrate the application of this approach, the Committee discussed the examples of a person with epilepsy whose condition is mitigated by medication and of a person with a hearing impairment whose hearing loss is corrected by the use of a hearing aid. In the Committee's view, these individuals would be covered by the ADA.

In a sharp break from the legislative history of the ADA, the position of the executive agencies responsible for enforcing the ADA, and the prior rulings of eight of the nine federal courts of appeal that had addressed the issue, the Supreme Court decided, in its rulings in the *Sutton v. United Airlines, Inc.*, *Murphy v. United Parcel Service*, and *Albertson's, Inc. v. Kirkingburg* cases, that mitigating measures should be considered in determining whether an individual has a disability under the ADA. The Supreme Court's position on mitigating measures ignores the rationale that led courts, regulatory agencies, and Congress to take a contrary position—that unless you disregard mitigating measures in determining eligibility for ADA protection, you shield much discrimination on the basis of disability from effective challenge.

The result of the Court's rulings on mitigating measures turns the ADA's definition of disability into an instrument for screening out large groups of individuals with disabilities from the coverage of the Act, and thereby insulating from challenge many instances of the pervasive unfair and unnecessary discrimination that the law sought to prohibit. To the extent that mitigating measures are successful in managing an individual's condition, the Supreme Court's stance on mitigating measures deprives the individual of the right to maintain an ADA action to challenge acts of disability discrimination she or he has experienced, because such a person is not eligible for the ADA's protection. This means an employer or other covered entity may discriminate with impunity against such individuals in various flagrant and covert ways. NCD issued

a policy paper examining the function and types of mitigating measures, discussing the near consensus in the law prior to the Supreme Court's taking a contrary position, and describing the repercussions of the Court's position. *The Role of Mitigating Measures in the Narrowing of the ADA's Coverage*, paper No. 11 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

Taking the condition of epilepsy to illustrate, before the Supreme Court's rulings in *Sutton*, *Murphy*, and *Kirkingburg*, "a person [with] epilepsy would receive nearly automatic ADA protection,"[19] consistent with statements in the ADA legislative history and regulatory guidance. The ADA regulatory commentary of the Equal Employment Opportunity Commission (EEOC) and Department of Justice (DOJ) specifically declared that an individual with epilepsy would remain within the coverage of the ADA even if the effects of the condition were controlled by medication.

The situation changed dramatically with the Supreme Court's mitigating measures decisions. To the extent that a covered entity can successfully demonstrate (after extensive, intrusive discovery into the details of the person's condition) that an individual's epilepsy is effectively controlled by medication, the individual cannot challenge the discriminatory actions of the covered entity. This is true even if the employer or other covered entity has an express policy against the hiring of people with epilepsy; puts up signs that say, "epileptics not welcome here"; inaccurately assumes that all persons with epilepsy are inherently unsafe; or has the irrational belief that epilepsy is contagious. The unfairness or irrationality of the covered entity's actions and motivations, including stereotypes, fears, assumptions, and other forms of prejudice, cannot be challenged by a person whose condition is mitigated. The end result is that it is a rare plaintiff who is in a position to challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated. One study, by the Epilepsy Legal Defense Fund, found that, of 36 cases in which courts had ruled on the issue since the Supreme Court issued its decision in *Sutton v. United Airlines*, 32 had decided that epilepsy was not a disability.

Epilepsy is an illustrative example, but the same principles apply to diabetes, various psychiatric disabilities, hypertension, arthritis, and numerous other conditions

that, for some individuals, can be controlled by medication. Moreover, the same problems arise with conditions for which techniques and devices other than medication provide an avenue for mitigation. Thus, a company that discriminates against people who use hearing aids will be insulated from challenge by people for whom the hearing aids are effective in offsetting, to some degree, diminution of functional ability to hear. Other mitigating measures, including prosthetic devices, can raise the same issues – to the extent that they are successful, they may lead to an argument that the person does not have a disability, even if she or he is discriminated against precisely because of the underlying condition or even the use of the mitigating measure itself. Obviously, this is directly contrary to the stated intentions of the House Judiciary Committee and the Congress as a whole.

C. Misconstruing a Central Premise Underlying the ADA

Courts that have espoused restrictive interpretations of the definition of disability under the ADA have truly missed the boat on disability. They have exhibited long-held, antiquated notions about disability and about the role of government in addressing disability. If courts think of people with disabilities as not capable of working, for example, anyone who is able to work must not be disabled. Similarly, access barriers were historically viewed by many people as being barriers because of an individual's disability, as opposed to the problem being the barrier itself. When a person with a mobility impairment, for example, could not cross a street with curbs, the person's disability was considered to be the reason, as opposed to recognizing that the design of the curb was deficient because it was done with only certain types of people in mind, when it could just as easily have been designed to be usable by all. The ADA embodies a social concept of discrimination that views many limitations resulting from actual or perceived impairments as flowing, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions. The social model is at variance with the medical model of disability that centers on assessments of the degree of a person's functional limitation.[1]

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1 In light of the courts' failure to appreciate and apply the social model of disability discrimination, NCD's *Righting the ADA* report suggests that the social model should be made explicit by incorporating it as an additional ADA finding as follows:

I once wrote that "[d]isability nondiscrimination laws, such as the Americans with Disabilities Act, and the disability rights movement that spawned them have, at their core, a central premise both simple and profound ... that people denominated as 'disabled' are just people -- not different in any critical way from other people."[2] To elaborate a bit on that idea, I wrote a section titled "People with Disabilities "People with Disabilities as Regular Joes and Janes" that I shall take the liberty of quoting from here:

> Over thirty years ago, Jacobus tenBroek characterized people with disabilities as "normal people caught at a physical and social disadvantage." In his remark, Professor tenBroek captured a truth that is both the guiding star and essential foundation ... -- that individuals with disabilities are just people, not essentially different from other people. Though this proposition is relatively simple to state, its acceptance is the single most universal aspiration of most individuals with disabilities, a central tenet of the Disability Rights Movement, and a *sine qua non* of real equality for people with disabilities.
>
> This helps to explain why terminology in regard to disabilities has been a sensitive issue. People with disabilities have come to recognize that processes by which they are assigned labels have reinforced the perception that they are substantially different from others. In response, they have strongly insisted that "we are `people first,'" and have demanded that their common humanity be acknowledged rather than their differentness magnified. It also explains why many individuals with disabilities resist attempts to characterize them as "special" or their daily accomplishments as "inspirational" or "courageous." At best, such

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> Discrimination on the basis of disability is the result of the interaction between an individual's actual or perceived impairment and attitudinal, societal, and institutional barriers; individuals with a range of actual or perceived physical or mental impairments often experience denial or limitation of opportunities resulting from attitudinal barriers, including negative stereotypes, fear, ignorance, and prejudice, in addition to institutional and societal barriers, including architectural, transportation, and communication barriers, and the refusal to make reasonable modifications to policies, practices, or procedures, or to provide reasonable accommodations or auxiliary aids and services.
> *Id.* at 109.

[2] Robert L. Burgdorf Jr. *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILLANOVA LAW REVIEW 409 (1997).

characterizations mark the individual so labeled as extraordinary and different from the rest of the population and one whose accomplishments and success are a surprise; at worst, they suggest that the speaker is saying "Being who you are is so bad that I could not face it -- I would just give up," "Your limitations are so severe that I don't see how you accomplish anything," or even "I would rather be dead than to live with your impairments." People with disabilities do not view their going about the tasks and trials involved in ordinary activities and trying to have accomplishments and success as something atypical and heroic. They would prefer to be seen for what they are, as ordinary individuals pursuing the same types of goals -- love, success, sexual fulfillment, contributing to society, material comforts, etc. -- as other folks.

The "integration" that is required under the ADA and Sections 501, 503, and 504, and the "full participation" that is the ultimate objective of federal laws relating to disabilities dictate that individuals with disabilities not be unnecessarily differentiated from the rest of society. To achieve this end, analysis under these laws should not focus on differentiating characteristics of the individual alleging discrimination, but instead on the practices and operations of covered entities to determine whether or not they are in fact discriminatory, when examined in light of latent flexibility in structuring and modifying tasks, programs, facilities, and opportunities. Legal standards imposed under these laws should serve to eliminate practices, policies, barriers, and other mechanisms that discriminate on the basis of disability, not to eliminate as many people as possible from the protection provided in these laws. In short, these laws seek to promote real equality, not to protect a special group.[3]

Despite common misconceptions that there are two distinct groups in society -- those with disabilities and those without -- and that it is possible to draw sharp distinctions between these two groups, people actually vary across a whole spectrum of infinitely small gradations of ability with regard to each individual functional skill. And the importance of particular functional skills varies immensely according to the situation,

[3] *Id.* at 534-536 (footnotes omitted).

and can be greatly affected by the availability or unavailability of accommodations and alternative methods of doing things. This human "spectrum of abilities" was recognized in a 1983 report by the U.S. Commission on Civil Rights - *Accommodating the Spectrum of Individual Abilities*. The Commission noted that, while the popular view is that people with disabilities are impaired in ways that make them sharply distinguishable from nondisabled people, instead of two separate and distinct classes, there are in fact "spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional."[4] In some of its publications, the National Council on Disability has explained and elaborated on the spectrum of abilities concept.[5]

In addition, authorities on disability are generally in agreement that the concept of disability entails a social judgment; people come to have a disability when they are viewed and treated as having one by other people. As the U.S. Commission on Civil Rights put it in *Accommodating the Spectrum of Individual Abilities*, "people are *made* different -- that is socially differentiated -- by the process of being seen and treated as different in a system of social practices that crystallizes distinctions ...."[6] Thus, the experience of disability is closely linked to the concept of discrimination. Individuals may encounter discrimination on the basis of disability whether or not they previously thought of themselves as having a disability, and whether or not they meet foreordained, medically oriented criteria. To achieve its purposes of eliminating discrimination and achieving integration, the ADA should reduce the unnecessary differentiation of people because of actual, perceived, or former physical and mental characteristics. It emphatically should not force people to demonstrate their differentness as a prerequisite to receiving protection under the Act.

The ADA is based on a social or civil rights model (sometimes referred to as a socio-political model), in contrast to the traditional "medical model." It views the limitations that arise from disabilities as largely the result of prejudice and discrimination

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[4] U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983), at p. 87.

[5] See, for example, National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 5, "Negative Media Portrayals of the ADA"* at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

[6] *Accommodating the Spectrum of Individual Abilities*, p. 95, n. 17).

rather than as purely the inevitable result of deficits in the individual. Sociology Professor Richard K. Scotch, a disability policy author, has written:

> In the socio-political model, disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations. All of these, in turn, reflect overly narrow assumptions about what constitutes the normal range of human functioning.[7]

Law Professor Linda Hamilton Krieger has written that the ADA's concept of disability views it "not only in terms of the internal attributes of the arguably disabled individual, but also in terms of external attributes of the attitudinal environment in which that person must function. `Disability,' under this conception, resides as much in the attitudes of society as in the characteristics of the disabled individual."[8] She elaborated on the ADA's adoption of the social model as follows:

> [T]he drafters of the ADA sought to transform the institution of disability by locating responsibility for disablement not only in a disabled person's impairment, but also in "disabling" physical or structural environments. Under such a construction, the concept of disability takes on new social meaning. It is not merely a container holding tragedy, or occasion for pity, charity, or exemption from the ordinary obligations attending membership in society. The concept of disability now also, or to a certain extent instead, contains rights to and societal responsibility for making enabling environmental adaptations. The ADA was in this way crafted to replace the old impairment model of disability with a socio-political approach.

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[7] Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 213, 214-15 (2000).

[8] Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 476, 480-81 (2000).

The National Council on Disability has discussed the necessity for applying the social model of disability under the ADA.[9] In the topic paper accompanying its initial proposal of an Americans with Disabilities Act, NCD expressly rejected the "medical model" and the need for people to demonstrate the severity of their limitations as a precondition to being protected from discrimination.[10] In its *Righting the ADA* report, NCD included a section titled "Incorporation of a Social Model of Discrimination." The Council declared:

> The ADA embodies a social concept of discrimination that views many limitations resulting from actual or perceived disabilities as flowing, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions. This is in contrast to the medical model of disability that centers on assessments of the degree of a person's functional limitation.[11]

Accordingly, NCD called for the enactment of a specific provision of its ADA Restoration Act proposal to make the endorsement of the social model explicit.[12]

D. Other Kinds of Problems Resulting from Supreme Court Rulings

Apart from problems with the definition of disability, the *Righting the ADA* report discusses in detail several other kinds of problems that have resulting from ill-advised ADA rulings of the Supreme Court. These include the following:

1. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Supreme Court rejected the "catalyst theory" that most lower courts had applied in determining the availability of attorney's fees and litigation costs to

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[9] See, for example, National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 5, "Negative Media Portrayals of the ADA"* at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

[10] National Council on Disability, *Toward Independence*, Appendix of Topic Papers (1986) at pp. A-22 to A-23.

[11] *Righting the ADA* at p. 109.

[12] *Id.*

plaintiffs in cases under the ADA and other civil rights statutes, and under other federal laws that authorize such payments to the "prevailing party."

2. In *Barnes v. Gorman*, the Supreme Court ruled that punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, under Section 202 of the ADA, or under Section 504 of the Rehabilitation Act.

3. In *Chevron U.S.A. Inc. v. Echazabal*, the Supreme Court upheld as permissible under the ADA the EEOC regulatory provision that allows employers to refuse to hire applicants because their performance on the job would endanger their health because of a disability, despite the fact that, in the language of the ADA, Congress recognized a "direct-threat" defense only for dangers posed to other workers.

4. In *U.S. Airways, Inc. v. Barnett*, the Supreme Court recognized a reasonableness standard for reasonable accommodations separate from undue hardship analysis.

5. In *U.S. Airways, Inc. v. Barnett*, the Supreme Court ruled that the ADA ordinarily does not require the assignment of an employee with a disability, as a reasonable accommodation, to a particular position to which another employee is entitled under an employer's established seniority system, but that it might in special circumstances. The Court declared that "to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not 'reasonable.'"

The implications of some of these rulings are a bit technical and a fuller explanation is not provided here. They are explained in some detail in *Righting the ADA* and in the specific topic papers mentioned in the report. As those sources explain, the negative impact of such decisions on the protection of people with disabilities under the ADA is significant and disturbing.

GETTING THE ADA BACK ON TRACK: REMEDIAL LEGISLATION

Based on its analysis of what has happened in the last 17 years since the ADA was enacted the National Council on Disability has reached the following conclusion:

> Incisive and forceful legislative action is needed to address the dramatic narrowing and weakening of the protection provided by the ADA, resulting from the Supreme Court's decisions, and to restore civil rights protections. Millions of Americans experience discrimination based on ignorance, prejudice, fears, myths, misconceptions, and stereotypes that many in American society continue to associate with certain impairments, diagnoses, or characteristics. To revive the scope and degree of protection that the ADA was supposed to provide—to address "pervasive" discrimination in a "comprehensive" manner, as the Act declares—and to put ADA protections on a more equal footing with other civil rights protections under federal law, it is necessary to remove conceptual and interpretational baggage that has been attached to various elements of the ADA. Any legislative proposal should address, in some way, each of the problems listed in Section II of this report [*Righting the ADA*] that the Court's decisions have created.

The remainder of my submission consists of the Executive Summary of NCD's *Righting the ADA* report. It contains a legislative proposal for getting the ADA back on course – an ADA Restoration Act bill with an explanatory introduction and a section-by-section summary. I believe it represents the best thinking to date on what ought to be done to "restore" the ADA to its original congressionally intended course. It is generally quite consistent with the amendments proposed in H.R. 3195 to restore the protections of the ADA.

Thank you very much for this opportunity to provide input to the Subcommittee on this highly important subject.

THE FOLLOWING IS FROM THE *RIGHTING THE ADA* REPORT OF THE NATIONAL COUNCIL ON DISABILITY (DECEMBER 2004), PP. 11-27:

Executive Summary

Many Americans with disabilities feel that a series of negative court decisions is reducing their status to that of "second-class citizens," a status that the Americans with Disabilities

Act (ADA) was supposed to remedy forever. In this report, the National Council on Disability (NCD), which first proposed the enactment of an ADA and developed the initial legislation, offers legislative proposals designed to get the ADA back on track. Like a boat that has been blown off course or tipped over on its side, the ADA needs to be "righted" so that it can accomplish the lofty and laudable objectives that led Congress to enact it.

Since President George H.W. Bush signed the ADA into law in 1990, the Act has had a substantial impact. The Act has addressed and prohibited many forms of discrimination on the basis of disability, although implementation has been far from universal and much still remains to be done. In its role in interpreting the ADA , the judiciary has produced mixed results. Led by the U.S. Supreme Court, the courts have made some admirable rulings, giving effect to various provisions of the Act. Unfortunately, however, many ADA court decisions have not been so positive. This report addresses a series of Supreme Court decisions in which the Court has been out of step with the congressional, executive, and public consensus in support of ADA objectives, and has taken restrictive and antagonistic approaches toward the ADA , resulting in the diminished civil rights of people with disabilities. In response to the Court's damaging decisions, this report seeks to document and explain the problems they create and advance legislative proposals to reverse their impact. NCD has developed more extensive and detailed analyses of these issues in a series of papers published under the title *Policy Brief Series: Righting the ADA Papers*. The papers can be found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

In an effort to return the ADA to its original course, this report offers a series of legislative proposals designed to do the following: (1) reinstate the scope of protection the Act affords, (2) restore certain previously available remedies to successful ADA claimants, and (3) repudiate or curtail certain inappropriate and harmful defenses that have been grafted onto the carefully crafted standards of the ADA.

As this report was going to press, the Supreme Court issued its decision in the case of *Tennessee v. Lane*, in which the Court upheld provisions of Title II of the ADA, as applied, to create a right of access to the courts for individuals with disabilities. The *Lane* ruling certainly merits additional study, and NCD expects to issue future analyses of the decision and the questions it leaves open. This report does not attempt to address such issues.

The body of the report at times discusses alternative legislative approaches to some of the problems it addresses. NCD has chosen, however, to consolidate its preferred solutions to the various problems into a single draft bill. The following represent the specific legislative proposals made by NCD at this time for "righting the ADA," first described in a Section-by-Section Summary and then presented as a proposed "ADA Restoration Act of 2004."

The ADA Restoration Act of 2004: Section-by-Section Summary

Section 1—Short Title
This section provides that the law may be cited as The ADA Restoration Act of 2004 and conveys the essence of the proposal's thrust, which is not to proffer some new, different rendition of the ADA but, rather, to return the Act to the track that Congress understood it would follow when it enacted the statute in 1990. The title echoes that of the Civil Rights Restoration Act of 1987, which was passed to respond to and undo the implications of a series of decisions by the Supreme Court, culminating in *Grove City College v. Bell,* which had taken a restrictive view of the phrase "program or activity" in defining the coverage of various civil rights laws applicable to recipients of federal financial assistance. As with that law, The ADA Restoration Act would "restore" the law to its original congressionally intended course.

Section 2—Findings and Purposes
Subsection (a) presents congressional findings explaining the reasons that an ADA Restoration Act is needed. It describes how certain decisions of the Supreme Court have weakened the ADA by narrowing the broad scope of protection afforded in the Act, eliminating or narrowing remedies available under the Act, and recognizing some unnecessary defenses that are inconsistent with the Act's objectives.

Subsection (b) provides a statement of the overall purposes of the ADA Restoration Act, centering on reinstating original congressional intent by restoring the broad scope of protection and the remedies available under the ADA, and negating certain inappropriate defenses that Court decisions have recognized.

Section 3—Amendments to the ADA of 1990
This section, and its various subsections, includes the substantive body of the ADA Restoration Act, which amends specific provisions of the ADA.

Subsection (a) revises references in the ADA to discrimination "against an individual with a disability" to refer instead to discrimination "on the basis of disability." This change recognizes the social conception of disability and rejects the notion of a rigidly restrictive protected class.

Subsection (b) revises certain of the congressional findings in the ADA. Paragraph (1) revises the finding in the ADA that provided a rough estimate of the number of people having actual disabilities, a figure that a majority of the Supreme Court misinterpreted as evidence that Congress intended the coverage of the Act to be narrowly circumscribed. The revised finding stresses that normal human variation occurs across a broad spectrum of human abilities and limitations, and makes it clear that all Americans are potentially susceptible to discrimination on the basis of disability, whether they actually have physical or mental impairments and regardless of the degree of any such impairment. Paragraph (2) revises the wording of the ADA finding regarding the history of purposeful unequal treatment suffered by people with certain types or categories of disabilities. Paragraphs (3) and (4) add a new finding that incorporates a social concept of disability and discrimination on the basis of disability.

Subsection (c) revises some of the definitions used in the ADA. Paragraph (1) amends the definition of the term "disability" to clarify that it shall not be construed narrowly and legalistically by drawing fine technical distinctions based on relative differences in degrees of impairment, instead of focusing on how the person is perceived and treated. This approach rejects the medical model of disability that categorizes people because of their supposedly intrinsic limitations, without reference to social context and socially imposed barriers, and to individual factors such as compensatory techniques and personal strengths, goals, and motivation. The second part, headed "Construction," invalidates the Supreme Court's rulings in *Sutton v. United Airlines*, *Murphy v. United Parcel Service*, and *Albertson's, Inc. v. Kirkingburg* by clarifying that mitigating measures, such as medications, assistive devices, and compensatory mechanisms shall not be considered in determining whether an individual has a disability.

Paragraphs (2) and (3) add definitions of the terms "physical or mental impairment," "perceived physical or mental impairment," and "record of physical or mental impairment" to the statutory language. These definitions are derived from current ADA regulations, and were recommended for inclusion in NCD's original 1988 version of the ADA.

Subsection (d) clarifies that the ADA's "direct-threat" defense applies to customers, clients, passersby, and other people who may be put at risk by workplace activities, but, contrary to the Court's ruling in *Chevron U.S.A. Inc. v. Echazabal*, not to the worker with a disability. The latter clarification returns the scope of the direct-threat defense to the precise dimensions in which it was established in the express language of the ADA as enacted.

Subsection (e) restores the carefully crafted standard of undue hardship as the sole criterion for determining the reasonableness of an otherwise effective accommodation.

Subsection (f) clarifies that ADA employment rights of individuals with disabilities, including the opportunity to be reassigned to a vacant position as a reasonable accommodation, are not to take a backseat to rights of other employees under a seniority system or collective bargaining agreement. In addition, covered entities are directed to incorporate recognition of ADA rights in future collective bargaining agreements.

Subsection (g) adds new subsections to the Remedies provision of Title II of the ADA. The first restores the possibility of recovering punitive damages available to ADA plaintiffs who prove they have been subjected to intentional discrimination, an opportunity that was foreclosed by the Supreme Court in *Barnes v. Gorman*. The second added subsection underscores the fact that other remedies, but not punitive damages, are available to ADA plaintiffs who prove that they have been subjected to "disparate impact" discrimination. The third new subsection establishes that intentionally refusing to comply with certain requirements of Title II of the ADA and the Rehabilitation Act, including accessibility requirements, auxiliary aids requirements, communication access requirements, and the prohibition on blanket exclusions in eligibility criteria and qualification standards, constitutes engaging in unlawful intentional discrimination.

Subsection (h) provides that the provisions of the Act are to be liberally construed to advance its remedial purposes. To counter the Court's ruling that eligibility for ADA protection should be "interpreted strictly to create a demanding standard for qualifying" (*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*), another provision declares that the elements of the definition of "disability" are to be interpreted broadly. In addition, the subsection provides that "discrimination" is to be construed broadly to include the various forms in which discrimination on the basis of disability occurs. The subsection adds provisions that direct the attorney general, the Equal Employment Opportunity Commission, and the Secretary of Transportation to issue regulations implementing the "ADA Restoration Act," and establish that properly issued ADA regulations are entitled to deference in administrative and judicial proceedings.

Subsection (i) corrects the ruling of the Supreme Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, which rejected the catalyst theory in determining eligibility of ADA plaintiffs to attorney's fees, by reinstating the catalyst theory.

Section 4—Effective Date
This section provides that the Act and the amendments it makes shall take effect upon enactment, and shall apply to cases that are pending when it is enacted or that are filed thereafter.

The ADA Restoration Act of 2004: A Draft Bill

To amend the Americans with Disabilities Act (ADA) of 1990 to restore the broad scope of protection and the remedies available under the Act, and to clarify the inconsistency with the Act of certain defenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1.—Short Title.
This Act may be cited as the "ADA Restoration Act of 2004."

Section 2.—Findings and Purposes.
(a) Findings.—The Congress finds that —

(1) in enacting the ADA of 1990, Congress intended that the Act "establish a clear and comprehensive prohibition of discrimination on the basis of disability," and provide broad coverage and vigorous and effective remedies without unnecessary and obstructive defenses;

(2) some decisions and opinions of the Supreme Court have unduly narrowed the broad scope of protection afforded in the ADA, have eliminated or narrowed remedies meant to be available under the Act, and have recognized certain defenses that run counter to the purposes of the Act;

(3) in enacting the ADA, Congress recognized that physical and mental impairments are natural and normal parts of the human experience that in no way diminish a person's right to fully participate in all aspects of society, but Congress also recognized that people with physical or mental impairments having the talent, skills, abilities, and desire to participate in society are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(4) Congress modeled the ADA definition of disability on that of Section 504 of the Rehabilitation Act of 1973, which had to the time of the ADA's enactment been construed broadly to encompass both actual and perceived limitations, and limitations imposed by society; the broad conception of the definition had been underscored by the Supreme Court's statement in its decision in *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), that the Section 504 definition "acknowledged that society's myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment";

(5) in adopting the Section 504 concept of disability in the ADA, Congress understood that adverse action based on a person's physical or mental impairment might have nothing to do with any limitations caused by the impairment itself;

(6) instead of following congressional expectations that disability would be interpreted broadly in the ADA, the Supreme Court has ruled, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), that the elements of the definition "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and, consistent with that view, has narrowed the application of the definition in various ways;

(7) contrary to explicit congressional intent expressed in the ADA committee reports, the Supreme Court has eliminated from the Act's coverage individuals who have mitigated the effects of their impairments through the use of such measures as medication and assistive devices;

(8) contrary to the expectations of Congress in enacting the ADA, the Supreme Court has rejected the "catalyst theory" in the awarding of attorney's fees and litigation costs under the Act, and has ruled that punitive damages may not be awarded in private suits under Section 202 of the Act;

(9) contrary to congressional intent and the express language of the ADA, the Supreme Court has recognized the defense that a worker with a disability could pose a direct threat to her or his own health or safety;

(10) contrary to carefully crafted language in the ADA, the Supreme Court has recognized a reasonableness standard for reasonable accommodation distinct from the undue hardship standard that Congress had imposed;

(11) contrary to congressional intent, the Supreme Court has made the reasonable accommodation rights of workers with disabilities under the ADA subordinate to seniority rights of other employees; and

(12) legislation is necessary to return the ADA to the breadth of coverage, the array of remedies, and the finely calibrated balance of standards and defenses Congress intended when it enacted the Act.

(b) Purposes.—The purposes of this Act are —

(1) to effect the ADA's objectives of providing "a clear and comprehensive national mandate for eliminating discrimination" and "clear, strong, and enforceable standards addressing discrimination" by restoring the broad scope of protection and the remedies available under the ADA, and clarifying the inconsistency with the Act of certain defenses;

(2) to respond to certain decisions of the Supreme Court that have narrowed the class of people who can invoke the protection from discrimination the ADA provides, reduced the remedies available to successful ADA claimants, and recognized or permitted defenses that run counter to ADA objectives;

(3) to reinstate original congressional intent regarding the definition of disability by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived impairment, or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning disability or particular disabilities, or by the failure to remove societal and institutional barriers;

(4) to restore the full array of remedies available under the ADA;

(5) to ensure that the rights afforded by the ADA are not subordinated by paternalistic and misguided attitudes and false assumptions about what a person with a physical or mental impairment can do without endangering the individual's own personal health or safety;

(6) to ensure that the rights afforded by the ADA are not subordinated to seniority rights of other employees in regard to an otherwise vacant job position to which the individual requires transfer as a reasonable accommodation; and

(7) to ensure that the carefully crafted standard of undue hardship as a limitation on reasonable accommodation rights afforded by the ADA shall not be undermined by recognition of a separate and divergent reasonableness standard.

Section 3.—Amendments to the ADA of 1990.
(a) Discrimination.—References in the ADA to discrimination "against an individual with a disability" or "against individuals with disabilities" shall be replaced by references

to discrimination "on the basis of disability" at each and every place that such references occur.

(b) Findings.—Section 2(a) of the ADA of 1990 (42 U.S.C. 12101(a)) is amended—

(1) by striking the current subsection (1) and replacing it with the following:

"(1) though variation in people's abilities and disabilities across a broad spectrum is a normal part of the human condition, some individuals have been singled out and subjected to discrimination because they have conditions considered disabilities by others; other individuals have been excluded or disadvantaged because their physical or mental impairments have been ignored in the planning and construction of facilities, vehicles, and services; and all Americans run the risk of being discriminated against because they are misperceived as having conditions they may not actually have or because of misperceptions about the limitations resulting from conditions they do have";

(2) by striking the current subsection (7) and replacing it with the following:

"(7) some groups or categories of individuals with disabilities have been subjected to a history of purposeful unequal treatment, have had restrictions and limitations imposed upon them because of their impairments, and have been relegated to positions of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society; classifications and selection criteria that are based on prejudice, ignorance, myths, irrational fears, or stereotypes about disability should be strongly disfavored, subjected to skeptical and meticulous examination, and permitted only for highly compelling reasons";

(3) by striking the period (".") at the end of the current subsection (9) and replacing it with "; and"; and

(4) by adding after the current subsection (9) the following new subsection:

"(10) discrimination on the basis of disability is the result of the interaction between an individual's actual or perceived impairment and attitudinal, societal, and institutional barriers; individuals with a range of actual or perceived physical or mental impairments often experience denial or limitation of opportunities resulting from attitudinal barriers, including negative stereotypes, fear, ignorance, and prejudice, in addition to institutional and societal barriers, including architectural, transportation, and communication barriers, and the refusal to make reasonable modifications to policies, practices, or procedures, or to provide reasonable accommodations or auxiliary aids and services."

(c) Definitions.—Section 3 of the ADA of 1990 (42 U.S.C. 12102) is amended—

(1) by striking the current subsection (2) and replacing it with the following:

"(2) Disability.

"(A) In General.—The term "disability" means, with respect to an individual—

(i) a physical or mental impairment;

(ii) a record of a physical or mental impairment; or

(iii) a perceived physical or mental impairment.

"(B) Construction.—

(i) The existence of a physical or mental impairment, or a record or perception of a physical or mental impairment, shall be determined without regard to mitigating measures;

(ii) The term "mitigating measure" means any treatment, medication, device, or other measure used to eliminate, mitigate, or compensate for the effect of an impairment, and includes prescription and other medications, personal aids and devices (including assistive technology devices and services), reasonable accommodations, or auxiliary aids and services; and

(iii) actions taken by a covered entity because of a person's use of a mitigating measure or because of a side effect or other consequence of the use of such a measure shall be considered 'on the basis of disability.'"

(2) by redesignating the current subsection (3) as subsection

(6); and

(3) by adding after the current subsection (2) the following new subsections:

"(3) Physical or mental impairment.—The term "physical or mental impairment" means—

"(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"(4) Record of physical or mental impairment.—The terms "record of a physical or mental impairment" or "record of impairment" means having a history of, or having been misclassified as having, a physical or mental impairment.

"(5) Perceived physical or mental impairment.—The terms "perceived physical or mental impairment" or "perceived impairment" mean being regarded as having or treated as having a physical or mental impairment."

(d) Direct threat.—Subsection 101(3) of the ADA of 1990 (42 U.S.C. 12111(3)) is amended—

(1) by redesignating the current definition as part (A)— In general; and

(2) by adding after the redesignated part (A) a new part (B) as follows:

"(B) Construction.—The term "direct threat" includes a significant risk of substantial harm to a customer, client, passerby, or other person that cannot be eliminated by reasonable accommodation. Such term does not include risk to the particular applicant or employee who is or is perceived to be the source of the risk."

(e) Reasonable accommodation.—Subsection 101(9) of the ADA of 1990 (42 U.S.C. 12111(9)) is amended—

(1) by redesignating the current definition as part (A)— Example s of types of accommodations.; and

(2) by adding after the redesignated part (A) a new part (B) as follows:

"(B) Reasonableness.—A reasonable accommodation is a modification or adjustment that enables a covered entity's employee or applicant with a disability to enjoy equal benefits and privileges of employment or of a job application, selection, or training process, provided that—

(i) the individual being accommodated is known by the covered entity to have a mental or physical limitation resulting from a disability, is known by the covered entity to have a record of a mental or physical limitation resulting from a disability, or is perceived by the covered entity as having a mental or physical limitation resulting from a disability;

(ii) without the accommodation, such limitation will prevent the individual from enjoying such equal benefits and privileges; and

(iii) the covered entity may establish, as a defense, that a particular accommodation is unreasonable by demonstrating that the accommodation would impose an undue hardship on the operation of the business of such covered entity."

(f) Nonsubordination.—Section 102 of the ADA of 1990 (42 U.S.C. 12112) is amended by adding after the current subsection (c) a new subsection as follows:

"(d) Nonsubordination.— A covered entity's obligation to comply with this Title is not affected by any inconsistent term of any collective bargaining agreement or seniority

system. The rights of an employee with a disability under this Title shall not be subordinated to seniority rights of other employees in regard to an otherwise vacant job position to which the individual with a disability requires transfer as a reasonable accommodation. Covered entities under this Title shall include recognition of ADA rights in future collective bargaining agreements."

(g) Remedies.—Section 203 of the ADA of 1990 (42 U.S.C. 12133) is amended—

(1) by redesignating the current textual provision as subsection (a)— In general ., and adding at the beginning of the text of subsection (a) the phrase "Subject to subsections (b), (c), and (d),"; and

(2) by adding, after the redesignated subsection (a), new subsections as follows:

"(b) Claims based on proof of in tent ional discrimination.—In an action brought by a person aggrieved by discrimination on the basis of disability (referred to in this section as an 'aggrieved person') under Section 202 of this Act, or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), against an entity covered by those provisions who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under those sections (including their implementing regulations), an aggrieved person may recover equitable and legal relief (including compensatory and punitive damages) and attorney's fees (including expert fees) and costs.

"(c) Claims based on disparate impact .—In an action brought by an 'aggrieved person' under Section 202 of this Act, or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), against an entity covered by those provisions who has engaged in unlawful disparate impact discrimination prohibited under those sections (including their implementing regulations), an aggrieved person may recover equitable relief and attorney's fees (including expert fees) and costs.

"(d) Construction.—In addition to other actions that constitute unlawful intentional discrimination under subsection (b), a covered entity engages in such discrimination when it intentionally refuses to comply with requirements of Section 202 of this Act, or of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or of their implementing regulations, by willfully, unlawfully, materially, and substantially—

(1) failing to meet applicable program and facility accessibility requirements for existing facilities, new construction and alterations;

(2) failing to furnish appropriate auxiliary aids and services;

(3) failing to ensure effective communication access; or

(4) imposing discriminatory eligibility criteria or employment qualification standards that engender a blanket exclusion of individuals with a particular disability or category of disability."

(h) Construction.—Section 501 of the ADA of 1990 (42 U.S.C. 12201) is amended by adding after the current subsection (d) the following new subsections:

"(e) Supportive construction.—In order to ensure that this Act achieves its objective of providing a comprehensive prohibition of discrimination on the basis of disability, discrimination that is pervasive in America, the provisions of the Act shall be flexibly construed to advance its remedial purposes. The elements of the definition of "disability" shall be interpreted broadly to encompass within the Act's protection all persons who are subjected to discrimination on the basis of disability. The term "discrimination" shall be interpreted broadly to encompass the various forms in which discrimination on the basis of disability occurs, including blanket exclusionary policies based on physical, mental, or medical standards that do not constitute legitimate eligibility requirements under the Act; the failure to make a reasonable accommodation, to modify policies and practices, and to provide auxiliary aids and services, as required under the Act; adverse actions taken against individuals based on actual or perceived limitations; disparate, adverse treatment of individuals based on disability; and other forms of discrimination prohibited in the Act.

"(f) Regulations implementing the ADA Restoration Act.—Not later than 180 days after the date of enactment of The ADA Restoration Act of 2004, the attorney general, the Equal Employment Opportunity Commission, and the Secretary of Transportation shall promulgate regulations in an accessible format that implement the provisions of the ADA Restoration Act.

"(g) Deference to regulations.—Duly issued federal regulations for the implementation of the ADA, including provisions implementing and interpreting the definition of disability, shall be entitled to deference by administrative bodies or officers and courts hearing any action brought under the Act."

(i) Attorney's fees.—Section 505 of the ADA of 1990 (42 U.S.C. 12205) is amended by redesignating the current textual provision as subsection (a)— In general, and adding additional subsections as follows:

"(b) Definition of prevailing party—The term `prevailing party' includes, in addition to a party who substantially prevails through a judicial or administrative judgment or order, or an enforceable written agreement, a party whose pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.

"(c) Relationship to other laws—

(1) Special criteria for prevailing defendants—If any other Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, or of any judicial or administrative rule, which addresses the recovery of attorney's fees, requires a defendant, but not a plaintiff, to satisfy certain different or additional criteria to qualify for the recovery of attorney's fees, subsection (b) shall not affect the requirement that such defendant satisfy such criteria.

"(2) Special criteria unrelated to prevailing—If an Act, ruling, regulation, interpretation, or rule described in paragraph (1) requires a party to satisfy certain criteria, unrelated to whether or not such party has prevailed, to qualify for the recovery of attorney's fees, subsection (b) shall not affect the requirement that such party satisfy such criteria."

Section 4.—Effective Date.
This Act and the amendments made by this Act shall take effect upon enactment and shall apply to any case pending or filed on or after the date of enactment of this Act.

ENDNOTES

[1] *Courts Continuing Narrow Interpretation of "Disability," Case Study Shows*, DISABILITY COMPLIANCE BULL. Mar. 27, 1997, at 10. See also, Amy L. Allbright, *ABA Special Feature: 2003 Employment Decisions Under the ADA Title I - Survey Update*, 28 MENTAL & PHYSICAL L. REP. 319, 320 (2004) ("A clear majority of the employer wins in this survey were due to [the] employees' failure to show that they had a protected disability.").

[2] 42 U.S.C. § 12101.

[3] *National Council on Disability, Equality of Opportunity : The Making of the Americans with Disabilities Act* at 184 (1997).

[4] Statement by Vice President Al Gore, December 14, 1998 , quoted in the Presidential Task Force on Employment of Adults with Disabilities, *Working on Behalf of Americans with Disabilities: President Clinton and Vice President Gore: Goals and Accomplishments* at 17.

[5] George W. Bush, *Presidential Proclamation on the Anniversary of the Americans with Disabilities Act, 2002* (July 26, 2002).

[6] NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* at 1 (2000).

[7] NCD, *Voices of Freedom: America Speaks Out on the ADA* at 26 (1995).

[8] *Id.* at 27.

[9] George W. Bush, *Presidential Proclamation on the Anniversary of the Americans with Disabilities Act, 2002* (July 26, 2002).

[10] See Mary Crossley, "The Disability Kaleidoscope," 74 *Notre Dame Law Review* 621, 622 (1999).

[11] *Tudyman v. United Airlines* , 608 F. Supp. 739 (C.D.Cal. 1984).

[12] H.R. Rep. No. 101-485, pt. 3, at 30 (1990).

[13] *Morrow v. City of Jacksonville* , 941 F. Supp. 816, 823 n. 3 (E.D.Ark. 1996).

[14] See, e.g., *Stone v. St. Joseph's Hospital of Parkersburg*, 538 S.E.2d 389, 400-402, 404 (W.Va. 2000), in which the Supreme Court of West Virginia, after acknowledging that the state law had been amended in 1989 to adopt the federal three-prong definition of disability, chose to reject the "restrictive approach" of federal interpretation of the definition, endorsing an "independent approach ... not mechanically tied to federal disability discrimination jurisprudence." The court also cited a number of cases from other states that had interpreted the definition of disability more expansively than under federal nondiscrimination laws. *Id.* at 405 and n. 23. Likewise, in *Dahill v. Police Department of Boston*, 434 Mass. 233, 748 N.E.2d 956 (2001), the Massachusetts Supreme Judicial Court embraced virtually every argument advanced by disability rights advocates that the United States Supreme Court had rejected in *Sutton v. United Airlines*, and ruled that mitigating measures should not be considered in determining whether an individual has a "handicap" under Massachusetts antidiscrimination law. According to the *Dahill* Court, the public policy underlying the antidiscrimination statute supported its interpretation that mitigating measures should be excluded, while embracing the *Sutton* standard would "exclude[ ] from the statute's protection numerous persons who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of a job." *Id.* at 240 and n. 10.

[15] See, e.g., *Granovsky v. Canada*, [2000] 1 S.C.R. 703, in which the Supreme Court of Canada expressly rejected the restrictive approach of the U.S. Supreme Court in *Sutton v. United Airlines*, noted the "ameliorative purpose" and "remedial component" of the disability nondiscrimination provision of the Canadian Charter of Rights and Freedoms, and adopted an approach in which the focus is "not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the [defendant] state to either or both of these circumstances." The Court added that it was the alleged discriminatory action "that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any) ..." Similarly, in *Quebec v. Canada*, [2000] 1 S.C.R. 665, the Supreme Court of Canada noted that "[h]uman rights legislation is [to be] given a liberal and purposive interpretation," and ruled, "The objectives of the Charter, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be

based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer." The Court ruled that "a 'handicap,' therefore, includes ailments which do not in fact give rise to any limitation or functional disability."

[16] Some states, such as California and Rhode Island , have amended their disability nondiscrimination statutes to reject federal case law narrowing the scope of individuals protected. Others, such as Connecticut , New Jersey , and New York have never adopted the rigid and stringent concept of "disability" consisting of an "impairment" which "substantially limits" one or more major life activities. For a discussion of state laws that have deviated from the restrictive federal model, see NCD's paper titled *Defining "Disability" in a Civil Rights Context: The Courts' Focus on the Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity.* Paper No. 6 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

[17] For example, the definition of disability provisions of Australia's Disability Discrimination Act of 1992 (4.(1)) and of Ireland's Employment Equality Act (1998) (2), both of which were adopted after the ADA was enacted, are framed in very broad terms that encompass not only a wide variety of currently existing conditions, but also include any condition that previously existed but no longer does, that "may exist in the future," or that "is imputed to a person."

[18] H.R. Rep. No. 101-485, pt. 3 at 28 (1990)

[19] *Todd v. Academy Corporation*, 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999).

Statement of David Ferleger, Esq.

Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties

on H.R. 3195, the "ADA Restoration Act of 2007"

October 4, 2007

Introduction

I appreciate the opportunity to supplement thee moving testimony of Charles Irvin Littleton, Jr. and Darbara Littleton with these observations.

I am privileged to represent Mr. and Ms. Littleton today. I do so as an advocate and attorney who, for decades, has worked on behalf of people with disabilities seeking to assist them in achieving recognition as full citizens with full participation in the benefits and responsibilities of our society. I have argued disability cases five times in the United States Supreme Court, litigated such cases nationally from Pennsylvania to California, from Massachusetts to Georgia and Alabama. For nine years, I was the Special Master appointed by a federal district judge to oversee a lawsuit by the U.S. Department of Justice against a state held in contempt for violating an order to remedy abysmal conditions in a large state institution. I also served as a court-appointed monitor of another institution for a federal court. I'm the author of law review and other articles and book chapters in the field and have taught disability law at New York University School of Law and the University of Pennsylvania Law School, and been invited by the United Nations to present on disability law issues. I have testified before the Senate on such issues as well.

Over the last three decades and more, I have seen the changes in the ways in which people with disabilities are treated under the law, in the workplace, on the street, in public services and in private accommodations. The ADA has been a Magna Carta for people with disabilities and has enabled employers, governments and public and private services to benefit from the access to which people with disabilities are now entitled.

On the first day of its term, this past Monday, the Supreme Court denied certiorari in Littleton v. Wal-Mart, Inc., No. 07-123, a case in which the court of appeals ruled that Mr. Littleton is not disabled under the Americans with Disabilities Act. He is entitled, the court ruled, to no protection from discrimination on account of his obvious and established disability.
I would like to begin by briefly commenting on several criticisms of the bill before the committee, ADA Restoration Act, and then speak in detail on the relationship of the ADA to the rights of people with disabilities, and on the way in which the current disability definition in the ADA, as interpreted by the courts, has sown great difficulties for our Nation.

Criticisms of the ADA Restoration Act

The ADA Restoration Act has been criticized for:

- Changing the definition of disability by deleting the "substantially limits...major life activities" phrase in favor of the simpler "physical or mental impairment."
- Reversing "rule" that employers determine the essential functions of a job.
- Granting deference to federal government agencies, taking away judicial authority.

These criticisms have little weight.

- The "substantially limits...major life activities," as interpreted by the Supreme Court, has caused confusion and difficulty, and much conflict among the circuit courts and lower courts. I provide a detailed example below. Core definitional issues on many "major life activities" cause fractured court decisions and consume countless, often fruitless, hours and dollars for employers and people with disabilities to sort through. Thus, the current law has caused difficulty. The ADA Restoration Act seeks to ease that difficulty.
- Courts have long both deferred to employers on essential job functions, and also been able to pierce pretextual definitions if employers were wrong or unreasonable or discriminatory. A revised definition will not harm employers' interests.
- Courts routinely defer, or give great weight, to the federal agencies charged by Congress with implementing federal laws. No judicial authority is compromised by the proposed changes in the ADA.

The ADA Has Benefited Individuals and Our Nation Immeasurably

The Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, as amended, 42 U.S.C. § 12101 *et seq. (1994 ed. and Supp. V),* capped national efforts to effectuate civil rights protection for Americans with Disabilities.[1] Congress intended the act to change behaviors affecting a vulnerable minority, akin to legislation to overturn racial discrimination. President Bush referred

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[1] Previous legislation included the Architectural Barriers Act of 1968, 42 U.S.C. § 4151 et seq., Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. § 701 *et seq.*, the Education of the Handicapped Act in 1970, 84 Stat. 175, amended in the Education for All Handicapped Children Act of 1975, 89 Stat. 773, reenacted in 1990 as the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., the 1975 Developmental Disabilities Assistance and Bill of Rights Act, 89 Stat. 486, 42 U.S.C. § 6001 et seq., the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee et seq., the Air Carrier Access Act of 1986, 49 U.S.C. § 41705, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 et seq.; and the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604.

to the ADA as an "historic new civil rights Act."[2] Senator Tom Harkin, a key sponsor, described it as the "20th century Emancipation Proclamation for all persons with disabilities."[3] Senator Robert Dole called it "the most comprehensive civil rights legislation our Nation has ever seen."[4]

The ADA is intended to benefit both the individual and our Nation. "The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 801 (1999).

This hearing comes against the national backdrop of thirty years of tremendous expansion of supported employment for people with mental retardation and related severe disabilities. People are now productive in our economy who would in the past have been excluded. Census 2000 counted 49.7 million non-institutionalized people with a long lasting condition or disability, including 33.2 million aged 16 to 64, of whom 6.8 million have a mental disability. Also, 21.3 million people in the 16 to 64 age group were found to have a condition that affected their ability to work at a job or business. 6.7 million in that age group have a mental disability.[5]

To take people with Mr. Littleton's disability as an example, people with intellectual and developmental disabilities comprise a substantial part of our Nation's population. There are 4.56 million people with "mental retardation" (now termed "intellectual disabilities") and developmental disabilities (MR/DD) in the United States.[6] Total federal, state and local spending for MR/DD services in FY 2002 was $34.6 billion.[7]

With the assistance of job coaches, such as that afforded to Mr. Littleton,[8] doors to employment have opened through what is called "supported employment." Supported employment is paid, competitive work for people who have severe disabilities and a demonstrated inability to gain and maintain traditional employment.

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[2] Burgdorf, Jr., R.L., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV.C.R.-C.L.L.REV. 413* (1991) (quoting President Bush at the signing ceremony).

[3] 136 Cong.Rec. S9688 (daily ed. July 13, 1990).

[4] 136 Cong.Rec. S9695 (daily ed. July 13, 1990).

[5] U.S. Census Bureau, Waldrop, J. & Stern, S. *Disability Status: 2000, Census 2000 Brief* (March 2003). The report does not break out mental retardation.

[6] D. Braddock, D., Hemp, R., and Rizzolo, M.C., *State of the States in Developmental Disabilities: 2004*, 42 Mental Retardation 356 (2004).

[7] *Id.*

[8] *E.E.O.C. v. Dollar General Corp.*, 252 F.Supp.2d 277 (M.D. N.C. 2003) (job coach as temporary accommodation under ADA for person with moderate retardation). See Parent, et al., *The Role of Job Coach: Orchestrating Community and Workplace Supports* (American Rehabilitation, Autumn, 1994).

Earnings in supported employment are estimated to be nearly $600 million annually, with over $100 million paid by such disabled workers in federal state and local taxes; individuals with disabilities in supported employment increased their annual earnings 490%.[9] People with disabilities in supported employment rose from about 10,000 persons in FY 1986 to 139,812 in FY 1995. The number of supported employment provider agencies grew steadily from an initial count of 324 for FY 1986 to 3,690 in FY 1995.[10]

As Interpreted by the Courts, the Current ADA Disability Definition Is Seriously Problematic

Mr. Littleton's case exemplifies how the current ADA disability definition and process, as interpreted in recent cases by the Supreme Court, produces unjust results, results which could not have been intended by Congress.

Mental retardation, the Supreme Court has recognized, is an impairment which requires education to improve self-care and self-sufficiency.[11] People with mental retardation, by the nature of the impairment, have difficulty interacting with others, thinking and communicating. Mental retardation obviously limits many such major life activities, the Court has repeatedly observed.[12]

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[9] American Association on Intellectual and Developmental Disabilities, Fact Sheet: Supported Employment (2007), http: //www.aamr.org/ Policies/faq_supported _employ.shtml. See Rusch, F. R., Keller, K. F., Ganguly, R., & Braddock, D., *Underestimating our nation's investment in segregation: Integrated versus segregated employment,* 29 Research and Practice for Persons with Severe Disabilities *237 (2004).*

[10] Wehman, P., Revell, G. & Kregel, J., *Supported Employment: A decade of rapid growth and impact.* 2 American Rehabilitation 31, 34 and 38 (Spring 1998).

[11] *Heller v. Doe by Doe*, 509 U.S. 312, 325 (1993) ("the mentally retarded are provided "habilitation," which consists of education and training aimed at improving self-care and self-sufficiency skills.").

[12] *Atkins v. Virginia*, 536 U.S. 304, 318 (2002):

> Because of their impairments, however, by definition they [people with retardation] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

The Court earlier explained that mental retardation is not defined by IQ alone but also by deficits in adaptive behavior.

> I."Deficits in adaptive behavior" are limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group.

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 443, n. 9 (1985). See *Olmstead v. L.C.*, 527 U.S. 581, 601 (1999) (in ADA context, "everyday life activities of individuals, includes] family relations, social contacts,...").

Yet, despite the fact that Mr. Littleton undoubtedly has retardation and is significantly limited in the workplace by his disability, the federal appeals court ruled – following the cramped interpretations in recent Supreme Court decisions – that he is absolutely unprotected by the ADA.

A successful ADA plaintiff must proceed in three steps. He or she must prove (1) that he has a physical or mental impairment, (2) that this impairment implicates at least one major life activity, and (3) that the limitation is substantial. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194-95 (2002); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).[13]

The ADA does not define the term "major life activities." This Court, however has explained that "'[m]ajor' in the phrase 'major life activities' means important" and these are activities "that the average person in the general population can perform with little or no difficulty," *Williams*, 534 U.S. at 197. An impairment's impact on a major life activity must be "permanent or long-term." *Williams*, 534 U.S. at 198. An activity may lack a "public" or "economic" dimension and still be considered important. *Bragdon*, 524 U.S. at 638.[14] Once the major life activity is identified, there must be a an "individualized" "case-by-case" analysis of whether the limitation on a major life activity is "substantial." *Williams*, 534 U.S. at 198; *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

Application of these terms – "major life activities" and "substantially limited" – has been a major cause for conflict and confusion in the courts. More importantly, perhaps, the constituents in our society which must apply the law have been confused and seriously limited by the terms themselves and the Supreme Court's attempts to provide guidance. Employers, schools, universities, public and private facilities, and people with disabilities, have spent untold millions of hours, and dollars, seeking to unravel in particular cases the correct application of the law in individual cases.

Let's take just one example of one "major life activity," the one present in Mr. Littleton's case. The courts of appeals are in conflict on whether "social interaction" (also termed, "interaction with others" or "interpersonal relations") is a major life activity under the ADA. In addition, those courts which superficially agree have adopted widely divergent interpretations.

The Second, Seventh, Eighth and Ninth Circuits have held or described interacting with others as a major life activity under the ADA. The First Circuit rejects the notion that it is a major life activity. The Fourth Circuit doubts that it is a major life activity. The Sixth and Tenth have declined to address or avoided the issue. Except in the *Littleton* case, the Eleventh Circuit has not discussed the issue. The federal district courts are in similar disarray over this issue, and have been without uniform guidance for years now.[15]

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[13] 42 U.S.C. § 12112(a) (prohibition on discrimination); 42 U.S.C. § 12102(2) (disability definition.

[14] "Major life activities" includes such basic abilities as walking, seeing, and hearing. *Williams*, 534 U.S. at 197. The term is further defined at 29 C.F.R. § 1630.2(i).

[15] *E.g., Bennett v. Unisys Corp.*, 2000. WL 33126583 (E.D. Pa. 2000) (it is a major life activity where an "individual's relations are characterized on a regular basis by severe problems such as high levels of hostility, social withdrawal, or failure to communicate when necessary."); *Logan*

In a stark example of the confusion, in 2005 two District of Columbia district courts issued decisions reaching opposite conclusions, one agreeing with the First Circuit and one agreeing with the contrary Second and Ninth Circuit cases.[16]

The inter-circuit conflict may be illustrated as follows:

A. Finding that social interaction is not a major life activity under the ADA:

> FIRST CIRCUIT: *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir.1997) ("the ability to get along with others" is never a major life activity under the ADA, observing that such an ability comes and goes, "triggered by vicissitudes of life which are normally stressful for ordinary people," and that "[t]o impose legally enforceable duties on an employer based on such an amorphous concept would be problematic.").

B. Finding or assuming that interacting with others is an ADA major life activity:

> SECOND CIRCUIT: *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2d Cir. 2004) (interacting with others is a major life activity).
>
> SEVENTH CIRCUIT: *Emerson v. Northern States Power Co.*, 256 F.3d 506, 511 (7th Cir.2001) ("interacting with others" is one of many "activities that feed into the major life activities of learning and working").
>
> EIGHTH CIRCUIT: *Heisler v. Metro. Council*, 339 F.3d 622, 628 (8th Cir.2003) (citing *McAlindin*, below, 9th Circuit decision); *Moysis v. DTG Datanet*, 278 F.3d 819, 825 (8th Cir.2002) (approves Seventh Circuit's treatment of interacting with others and concentrating as activities that "feed into the major life activities of learning and working")
>
> NINTH CIRCUIT: *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir.1999), *amended by* 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000) (interacting with others is "an essential, regular function, like walking and breathing" that

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v. Nicholson, 2006 WL 1492243 (S.D. Tx., May 30, 2006) ("socializing" is not a major life activity; acknowledges conflict among circuits; adopts variation of Second Circuit standard); *Mickens v. Polk County School Bd.*, 430 F.Supp.2d 1265, 1276 (M.D. Fla. 2006) ("Some doubt exists whether working and otherwise interacting with others qualify as "major life activities.'"); *Zale v. Sikorsky Aircraft Corp.*, 2000 WL 306943 (D. Conn. 2000) (agrees with Ninth Circuit); *Peter v. Lincoln Technical Institute, Inc.*, 255 F.Supp.2d 417 (E.D.Pa.,2002) (interaction with others is a major life activity); *McKay v. Town and Country Cadillac, Inc.*, 2002 WL 1285065 (N.D.Ill.,2002) (tilts toward Ninth Circuit approach but characterizes it as involving "family and social relations"); *Herschaft v. New York Bd. of Elections*, 2001 WL 940923, n. 7 (E.D.N.Y.,2001) ("There is a split of authority on the question.").

[16] *Battle v. Mineta*, 387 F.Supp.2d 4, 9 (D.D.C. 2005) ("The D.C. Circuit has yet to decide" the issue; agrees with First Circuit; social interaction is "too undefined, indistinct."); *Bell v. Gonzales*, 398 F.Supp.2d 78 (D.D.C. 2005) (agrees with Second and Ninth Circuits).

"easily falls within the definition of 'major life activity'"); *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005) (interacting with others is a major life activity).

C. Avoiding decision on the issue or assuming without deciding:

SIXTH CIRCUIT: *MX Group, Inc. v. City of Covington,* 293 F.3d 326, 337 (6th Cir.2002) ("it has been held that 'interacting with others,' is a major life activity" but declining to decide the issue).

TENTH CIRCUIT: *Doebele v. Sprint/United Management Co.,* 342 F.3d 1117 (10th Cir. 2003) (notes circuit split); *Kourianos v. Smith's Food & Drug Centers, Inc.*, 65 Fed.Appx. 238 (10th Cir. 2003) (characterizing the issue as "emotional stability," notes "split among the circuits on the issue" of interaction with others); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1254-55 (10th Cir.2001) (declining to address issue; notes circuit split); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492 10th Cir. 2000) (assumes interacting with others is major life activity)

D. Doubting that interacting with others is a major life activity:

FOURTH CIRCUIT: *Rohan v. Networks Presentations LLC,* 375 F.3d 266, 274 (4th Cir.2004) ("decline to resolve" this issue, while noting the conflicting views among the circuits); *Davis v. Univ. of N.C.*, 263 F.3d 95, 101 n. 4 (4th Cir.2001) (doubts that interacting with others is major life activity).

One could multiply the confusion illustrated above by examining cases across the variety of physical and mental disabilities. When the stringent and cramped approach mandated by the Supreme Court, and the statute's current terminology, are applied to the realities facing people with disabilities in our society, the result is often patent unfairness and injustice.

Conclusion

When the stringent and cramped approach mandated by the Supreme Court, and the statute's current terminology, are applied to the realities facing people with disabilities in our society, the result is often patent unfairness and injustice.

I strongly urge Congress to simplify the ADA disability definition. We need to ensure that we abandon the needlessly complex structure which stands in the way of enabling people with disabilities to fully participate in our society.

The Magna Carta which is the ADA needs some adjustment if it is to fulfill the promises which the Congress and the President made in 1990.

NCIL

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John A. Lancaster
Executive Director

October 4, 2007

The Honorable Jerrold Nadler, Chair
The Honorable Trent Franks, Ranking Member
Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler, Ranking Member Franks, and Distinguished Members:

We are writing on behalf of the National Council on Independent Living (NCIL) to strongly urge you to support the ***ADA Restoration Act of 2007, H.R. 3195***. Since enactment of the Americans with Disabilities Act of 1990, people with disabilities have made substantial strides toward societal inclusion and full participation. However, in recent years, a number of Supreme Court decisions have significantly reduced the protections available to people with disabilities in employment settings. Restoring the Act to Congress' original intent would enable people with disabilities to secure and maintain employment without fear of losing their job because of their disability. Congress clearly intended to cover the full spectrum of disabilities, both visible and invisible.

NCIL is the oldest cross-disability, national grassroots organization run by and for people with disabilities. Our members include Centers for Independent Living, State Independent Living Councils, people with disabilities, and other disability rights organizations. As a membership organization, NCIL advances independent living and the rights of people with disabilities through consumer-driven advocacy. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

A key part of our work is to implement the integration mandate of the Americans with Disabilities Act by moving people with disabilities out of institutions and into community-based settings so they can control their own destinies and live independently. NCIL also works tirelessly to ensure that the Americans with Disabilities Act and other crucial civil rights laws are not only fully implemented, but also enforced.

We welcome the opportunity to comment on this critical civil rights law and look forward to a robust discussion of ways in which we can work together to achieve the full promise of the ADA.

Background: Passed with overwhelming bipartisan support, the Americans with Disabilities Act of 1990 was designed as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Without doubt, the ADA has transformed America's communities, removing barriers to persons with disabilities in the built environment and infrastructure, and has substantively advanced the cause of community integration for people with disabilities.

Issues: Yet, as you will hear today from National Council on Disability Executive Director Michael Collins, NCD documented in its "Righting the ADA" report, a series of flawed Supreme Court decisions have seriously undermined our ability to realize the full promise of the ADA. In Sutton v. United Airlines, and Toyota v. Williams, the Supreme Court has taken to interpreting the definition of disability in a restrictive manner that Congress never envisioned, placing the burden on persons with disabilities to prove that they are entitled to the ADA's protections – particularly in the employment sphere. This creates a Catch-22 in which employees can be discriminated against on the basis of their disability but unable to enforce their rights because they cannot meet the high threshold the courts have set to prove they are disabled. Furthermore, in University of Alabama v. Garrett, the Supreme Court ruled 5-4 that the 11th Amendment prohibits suits in federal court by state employees to recover money damages under Title I of the ADA. The Supreme Court's restrictive approach to the ADA in employment cases is especially disconcerting since the unemployment of persons with disabilities wishing to work remains widespread.

Proper implementation of the original intent of the ADA in the employment sphere is critical to the economic self-sufficiency and full societal participation of people with disabilities that is at the core of the Independent Living (IL) movement. The fact that only 7% of persons with disabilities own their own homes and roughly 30% of Americans with disabilities are employed is a reflection of the continued inability of persons with disabilities to enforce their right to non-discrimination in the workplace under the Americans with Disabilities Act.

Issues Raised by the U.S. Chamber of Commerce: The U.S. Chamber of Commerce claims that H.R. 3195 ensures that protections on the basis of disability apply broadly. This is correct. The Supreme Court did not understand that significant disability as defined by the Americans with Disabilities Act includes people with intellectual disabilities (formerly known as Mental Retardation), epilepsy, diabetes, cancer, and mental illnesses, among others. For a person who merely has poor vision that is correctible, he or she may indeed be considered disabled by a court. The question is not whether a person with a disability has a disability or is regarded as a person with a disability. The question is whether or not the person has been discriminated against on the basis of disability. The intent of H.R. 3195 is to prevent discrimination on the basis of disability, not to create a protected class.

The Chamber of Commerce also alleges that "H.R. 3195 would reverse the long-standing rule that allows employers to determine what the essential functions of a job are, allowing plaintiffs to second-guess routine job decisions that employers must make every day." There is no such language in H.R. 3195 to this effect.

The problem with the Supreme Court's and lower courts' decisions referenced in HR 3195's "Findings and Purposes" is that they have not even considered whether there has been discrimination based on disability. Therefore, the courts ruled that the plaintiff was either not disabled or not disabled enough to be protected by the ADA. Had the courts properly reviewed these cases, they would have decided them on the basis of whether the plaintiff was

qualified to perform the essential functions of the job with or without reasonable accommodation.

The real problem in the Chamber of Commerce's August 22 letter to the U.S. House of Representatives is not their fallacious reasoning, but the blatant prejudice it exhibits against Americans with disabilities. NCIL has members in all but five Congressional Districts. Our experience working with businesses in communities across the country over three decades shows that the majority of businesses are more open minded than the board and staff of the Chamber of Commerce.

NCIL supports:

- Enactment of the ADA Restoration Act as introduced by House Majority Leader Steny Hoyer, Rep. James Sensenbrenner, and cosponsored by more than 200 of their colleagues to remedy decades of purposeful, unconstitutional discrimination and as such should be given a broad, rather than a narrow, construction;

- Funding for ongoing public education on the requirements of the ADA, and adequate funding for strong enforcement by the US Department of Justice, US Equal Employment Opportunity Commission, Federal Communications Commission, and other agencies with enforcement responsibilities;

- Creative efforts by federally-funded enforcement, technical assistance, and advocacy organizations to promote the positive aspects of the ADA's accessibility and equal opportunity requirements;

  Efforts by States to voluntarily waive their immunity from damage suits brought by people with disabilities under Titles I and II of the ADA, and;

- Bipartisan Congressional efforts to overturn Supreme Court decisions narrowing the scope of the ADA, by enacting the ADA Restoration Act, H.R. 3195.

Thank you for your consideration. Please do not hesitate to contact Deb Cotter of our policy staff if you have additional questions or concerns. Deb can be reached at (202) 207-0334 or deb@ncil.org

Sincerely,

John A. Lancaster
Executive Director

Kelly Buckland
President

STATEMENT IN SUPPORT OF THE ADA RESTORATION ACT OF 2007 (H.R. 3195)

The Disability Policy Collaboration of The Arc and United Cerebral Palsy Urges Congress to Keep its Promise to End Unfair Employment Discrimination

Although the Americans with Disabilities Act (ADA) of 1990 has resulted in access to thousands of public accommodations and government services that people with disabilities were never before able to enjoy, the full promise of this law is yet unfulfilled. People with disabilities who want to work and be treated fairly in the workplace face the same continued discrimination that the ADA sought to eliminate.

The Supreme Court and other court decisions have narrowly interpreted the definition of disability under the ADA, which is reasonably defined as: (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

Instead of protecting people with disabilities, the courts have created a no–win situation for people with disabilities in the workplace. People with disabilities are often deemed "too disabled" to do the job but not "disabled enough" to be protected by the law. The following cases exemplify this unfortunate catch-22:

- A pharmacist with diabetes was fired for taking a break to eat during his ten-hour shift. He needed a brief lunch break to properly regulate his blood glucose and control his diabetes. He was fired because he continued to manage his disability by the best practice guidelines of proper food intake. The court deemed he was not disabled enough to be protected under the ADA because his diabetes was so well-managed--Not disabled enough for protection under the ADA and yet "too disabled" to work.

- A stock merchandiser with lifelong epilepsy was fired after a five-day absence related to his condition. The court held he was not protected by the ADA because he typically experienced seizures once a week, lasting only five to fifteen seconds, and his medication caused only "some" adverse side effects. He was fired because of his disability, but the court refused to hear his case because he was "not disabled enough."

- A circuit court upheld a lower court's refusal to hear the case of a man with an intellectual disability. Writing for the majority, the judge wrote that it wasn't clear under the ADA "whether thinking, communicating and social interaction are 'major life activities.'"

Restoring Congress' intent when it passed the ADA in 1990

"[T]he point of the ADA is not disability; it is the prevention of wrongful and unlawful discrimination. Passage of [the ADA Restoration Act] is critical to helping us achieve the ADA's promise – and creating a society in which Americans with disabilities can realize their potential," stated House Majority Leader Steny Hoyer when he introduced the ADA Restoration Act of 2007.

The bipartisan ADA Restoration Act of 2007 will amend the ADA to shift the focus from requiring individuals with disabilities to "prove" their disability to determining whether a person has experienced discrimination "on the basis of disability." By eliminating the catch-22, the ADA Restoration Act restores the right to be judged based solely on one's qualifications for the job, bringing the ADA in line with other civil rights laws and requiring the courts to interpret the law fairly.

The Disability Policy Collaboration strongly urges Congress to pass the ADA Restoration Act (H.R. 3195), restoring the original intent of Congress when in passed the ADA in 1990.

AMERICAN
PSYCHOLOGICAL
ASSOCIATION

Testimony
on behalf of the
American Psychological Association
for the hearing record
of the U.S. House Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
On H.R. 3195, the "ADA Restoration Act of 2007"
The Honorable Jerrold Nadler, Chairman

October 12, 2007

The American Psychological Association (APA) is the largest scientific organization representing psychology in the United States with a membership of 148,000 members, including researchers, educators, clinicians, consultants, and graduate students. APA works to advance psychology as a science, as a profession and as a means of promoting health, education and human welfare. APA's commitment to disability concerns is reflected in APA's governance structure which includes the Committee on Disability Issues in Psychology, as well as divisions devoted to rehabilitation psychology, cognitive, intellectual, and developmental disabilities.

The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) has long been considered the "Civil Rights Act" for people with disabilities. Historically, disability has constituted the most socially overlooked individual difference within the spectrum of diversity (Bluestone, Stokes & Kuba, 1996; Leigh, Corbett, Guttman & Morere, 1996). With its passage in 1990, the ADA promised to end exclusion and inequality for the 20 percent of Americans with disabilities. Since that time, the ADA has afforded individuals with disabilities a much-needed and long overdue opportunity to combat discrimination.

The Need for Restoration of the Americans with Disabilities Act

People with disabilities continue to experience documented discrimination, either blatant or subtle, in employment, housing, education, leisure, and health care as a result of their differences. (Atkinson & Hackett, 1995; Mackelprang & Salsgiver, 1999; Swain, Finkelstein, French & Oliver, 1993). There are continuing challenges to the ADA, particularly in the courts, which have reduced the scope and effectiveness of the Act.

As a result of a series of Supreme Court decisions and other cases, it has become difficult for individuals with specific health conditions to establish that they have a disability for purposes of the ADA. This includes individuals with mental health problems, psychiatric diagnoses, and other conditions that are controlled with medications or other disease management strategies. They are dismissed as "not disabled enough" to warrant protection of the statute. The emphasis is erroneously placed on the qualification rather than on the discriminatory action. This is of particular concern to APA as the largest number of persons potentially affected by the ADA will either have mental disabilities or be treated for emotional or psychological problems (Gostin & Beyer, 1993).

APA applauds Congress' recognition that individuals with physical or mental impairments are often excluded from societal participation despite their talents and skills due to discrimination, and/or failure to remove societal and institutional barriers. Research illustrates that society's negative perception and/or lack of knowledge regarding individuals with disabilities and its symptomatology can lead to adverse consequences.

Psychology and the Americans with Disabilities Act

APA has been involved in the development and adoption of this historic legislation since its inception. In 1997, the APA Council of Representatives affirmed its support of psychologists with disabilities and the ADA in a policy statement. The Policy Statement on Full Participation for Psychologists with Disabilities not only reiterates APA's non-discrimination policy, but recognizes the history of physical, social, communicative and attitudinal barriers experienced by individuals with disabilities. The APA has continued this commitment to end discrimination for the millions of individuals with disabilities with its support for the ADA Restoration Act of 2007.

The Americans with Disabilities Restoration Act of 2007 (H.R. 3195).

The ADA Restoration Act amends the Americans with Disabilities Act of 1990 by clarifying the definition of "disability" to restore the original Congressional intent and to ensure the right of individuals with disabilities to be judged based by their performance rather than by their disability.

In closing, the APA would like to thank Chairman John Conyers, Jr., Ranking Member Lamar S. Smith, as well as Subcommittee Chairman Jerrold Nadler, and Ranking Member Trent Franks for holding this important hearing. APA would also like to extend its appreciation to Majority Leader Steny Hoyer and Representative James Sensenbrenner, Jr. for their leadership in championing this critical legislation.

Please regard the APA as a resource to the subcommittee in your deliberations on this important matter.

Resources

American Psychological Association (1982). *Policy Statement on Physical and Social Accessibility.*

American Psychological Association (1997). *Policy Statement on Full Participation for Psychologists with Disabilities*

American Psychological Association (2003). *Ethical Principles of Psychologists and Code of Conduct.* Accessed 08/28/07 at: http://www.apa.org/ethics/code2002.html.

Atkinson, D., & Hackett, G. (1995). *Counseling diverse populations*. Dubuque, IA: Brown & Benchmark.

Bluestone, H. H., Stokes, A., & Kuba, S. (1996). Toward an integrated program design: Evaluating the status of diversity training in a graduate school curriculum. *Professional Psychology: Research and Practice*, 27, 394-400.

Fichten, C. S., & Amsel, R. (1986). Trait attributions about college students with a physical disability: Circumplex analyses and methodological issues. *Journal of Applied Social Psychology*, 16(5), 410-427.

Gostin, L. O., & Beyer, H. A. (Eds.)(1993). *Implementing the Americans With Disabilities Act: Rights and Responsibilities of All Americans*. Baltimore: Brookes.

Kleck, R. E., & Dejong, W. (1981). Adults' estimates of sociometric status of handicapped and nonhandicapped children. *Psychological Reports*, 49, 951–954.

Leigh, I. W., Corbett, C. A., Gutman, V., & Morere, D. A. (1996). Providing psychological services to deaf individuals: A response to new perceptions of diversity. *Professional Psychology Research and Practice,* 27(4), 364-371.

Mackelprang, R., & Salsgiver, R. (1999). *Disability: A Diversity Model Approach in Human Service Practice*. Pacific Grove, CA: Brooks/Cole.

Swain, J., Finkelstien, V., French, S., & Oliver, M. (Eds.)(1993). *Disabling Barriers – Enabling Environments*. Beverly Hills, CA: Sage.

Tomes, H., (2005). Civil Rights for People with Disabilities. *Monitor on Psychology*; 2005; 36(6).

October 3, 2007

The Honorable John Conyers, Jr.
Chairman
House Committee on Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Conyers:

On behalf of the undersigned veterans service organizations we want to thank you for introducing the ADA Restoration Act of 2007 (H.R. 3195). This legislation will restore the Americans with Disabilities Act (ADA) to its original intent as passed by the Congress in 1990.

The ADA is landmark civil rights legislation that bars discrimination based on disability in employment, transportation, public accommodation and public services. Unfortunately, due to narrow and restrictive interpretations of what constitutes a "disability," the full potential of this legislation is not being met, particularly in the area of employment. Courts decide against people claiming discrimination based on disability 97% of the time and unemployment rates remain high.

As a result of these court rulings, veterans returning from war with post traumatic stress syndrome, traumatic brain injury, epilepsy, depression, hearing impairments, and loss of the use of limbs, who face discrimination based on these conditions in employment may be found by the courts not to be "disabled enough" to be protected by the ADA. (A sampling of cases in which people with such impairments were not covered under the ADA is attached.) H.R. 3195 would remedy this injustice.

As organizations that represent veterans, men and women who have served honorably in our nations' military, we believe it is imperative that Congress uphold the civil rights of all our citizens, including our soldiers who incur disabilities. The rights of our citizens form the basis of our country. These are the principles that we live by and fight to protect for others.

Chartered by the Congress of the United States

801 Eighteenth Street, NW ★ Washington, DC 20006-3517
phone:(202) 872-1300 ★ tdd:(202) 416-7622 ★ fax:(202) 785-4452 ★ www.pva.org

Again thank you for your strong leadership to restore the ADA.

Sincerely,

Blinded Veterans Association
Disabled American Veterans
Jewish War Veterans of the USA
Paralyzed Veterans of America
Veterans of Foreign Wars of the United States
Vietnam Veterans of America

STATEMENT FOR THE RECORD

OF PARALYZED VETERANS OF AMERICA

BEFORE THE

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

CONCERNING

ADA RESTORATION ACT OF 2007

OCTOBER 4, 2007

On behalf of the Paralyzed Veterans of America (PVA), thank you for the opportunity to submit these comments on HR 3195, the ADA Restoration Act of 2007. PVA is a national veterans service organization charted by the Congress of the United States to meet the needs of its members, veterans who are paralyzed as a result of spinal cord injury or dysfunction. PVA has 34 chapters and approximately 20,000 members, all of whom meet the current definition of a person with a disability as defined by the ADA.

Chartered by the Congress of the United States

801 Eighteenth Street, NW ★ Washington, DC 20006-3517
phone:(202) 872-1300 ★ tdd:(202) 416-7622 ★ fax:(202) 785-4452 ★ www.pva.org

The Americans with Disabilities Act of 1990 is landmark civil rights legislation that bars discrimination based on disability. The ADA passed with overwhelming bipartisan support with the goals of assuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. The law prohibits discrimination in employment, public accommodations, public services, telecommunications and transportation.

However, in recent years, the Supreme Court has severely restricted its impact, stating that mitigating measures - medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise or any other treatment – must be considered in determining whether an individual has a disability and is protected by the ADA, Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). With this decision, the Court eliminated individuals with epilepsy, diabetes, HIV infection, cancer and others, possibly including people who use prostheses, from coverage under the ADA for discrimination in employment.

The Court in rendering its decision ignored case precedent and legislative history. Congress explicitly stated that it did not intend mitigating measures to be considered in determining whether a person has a disability: "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids" S. Rep. No. 116, 101st Cong., 2d Sess. at 22 (1989).

This is especially troubling to PVA because veterans often incur illnesses, diseases or disabilities that can be managed with medication, prosthetics and therapy. This would include those who manage their post traumatic stress syndrome (PTSD) with medication and therapy. Thousands of veterans with disabilities work every day at their jobs to support their families and their way of life; should they suffer discrimination at work, there is a good chance they may have no remedy at law. Current studies show that courts decide against people who challenge disability discrimination 97% of the time, often before the person has even had a chance to show that the employer treated them unfairly.

In 2004, 2.6 million living veterans received compensation for service-related disabilities.[1] In the wake of the Supreme Court's restrictive interpretation of the definition of "disability" under the ADA, however, many veterans who return from war with post traumatic stress disorder (PTSD), traumatic brain injury, epilepsy, depression, hearing impairments, loss of the use of limbs and other conditions, may find they are not protected by the ADA. Cases brought under the ADA demonstrate this jeopardy:

- A truck driver who had limited use of one hand as a result of an injury he sustained in the Army, and who was told by his employer that "he was being fired because of his disability, he was crippled, and the company was at fault for having hired a handicapped person,"[2] was not protected by the ADA. The court ruled that the employer did not regard Robert Tockes as disabled when it fired him for using only one hand to fasten a load on a flatbed truck. While, "[o]bviously [the employer] knew [Mr. Tockes] had a disability," the court stated, that "does not mean that it thought him so far disabled as to fall within the restrictive meaning the ADA assigns to the term."[3]

- A merchandise stocker with lifelong epilepsy who was fired after being out sick with a stomach flu for five consecutive days was not protected by the ADA. The court held that James Todd was not "disabled" because he had seizures only once a week, lasting only five to fifteen seconds.[4] According to the court, the fact that Mr. Todd lay shaking on the floor and unable to walk, talk, or think for fifteen seconds per week amounted to "only" a "momentary physical limitation which could not be classified as substantial."[5] (Note: many veterans who have traumatic brain injury later develop seizure disorders.)

- A store maintenance worker with a traumatic brain injury that caused a four-month coma, weeks of rehabilitation, an inability to work for fourteen years, blurred vision,

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[1] United States Census Bureau, *Facts for Features: Veterans Day 2006* (Oct. 12, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/007611.html.
[2] Tockes v. Air-Land Transport Services, Inc., 343 F.3d 895, 896 (7th Cir. 2003).
[3] *Id.*
[4] Todd v. Academy Corp., 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999).
[5] *Id.* at 454.

dizziness, spasms in his arms and hands, slowed learning, headaches, poor coordination, and slowed speech was not protected by the ADA.[6] The court held that "this evidence does not establish that [Christopher Phillips] is substantially limited in the major life activities of learning, speaking, seeing, performing manual tasks, eating or drinking," and, therefore, Mr. Phillips was not "disabled" under the ADA.[7]

- A salesperson who developed major depression and PTSD after discovering that his minor children had been abused, and who was subsequently fired for failing to attend a training session that he was originally told he did not have to attend, was not protected by the ADA. Because Michael Schriner did so well managing his condition with medication, the court found he was not "substantially limited in a major life activity" and therefore not "disabled" under the ADA.[8]

- A railroad employee who used a hearing aid, and who was told by her employer that the employer "could not hire someone with a hearing aid because [the employer] had no way of knowing if she would remember to bring her hearing aid to work," was not protected by the ADA.[9] The court held that Ruth Eckhaus "failed to show that her hearing impairment, when corrected by hearing aids, substantially limits a major life activity," and was therefore "not disabled" under the ADA.[10]

- A court security officer with a history of depression, who was fired from his job after a doctor reviewed his medical files and decided that he was "not medically qualified" because of his depression and use of medication, was not protected by the ADA.[11] Even though Michael McMullin was fired because of his depression, the court held that he was "not disabled" under the ADA because he successfully mitigated the symptoms

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[6] Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274, 1282 n.6 (S.D. Ala. 1999).
[7] *Id.* at 1283.
[8] Schriner v. Sysco Food Serv., No. Civ. 1CV032122, 2005 WL 1498497, at *5 (M.D.Pa. June 23, 2005).
[9] Eckhaus v. Consolidated Rail, Corp., No. Civ. 00-5748(WGB), 2003 WL 23205042, at *5 (D.N.J. Dec. 24, 2003).
[10] *Id.* at *8.
[11] McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1289 (D. Wyo. 2004).

of his depression with medication. The court also held that his history of sleep deprivation and insomnia, which resulted in his getting only two to three hours of sleep per night, was "not 'severe' enough to constitute a substantial limitation on the major life activity of sleeping."[12]

- A frozen food delivery manager with a permanently injured arm who was fired because of limitations resulting from his injury was not protected by the ADA. The court concluded that even though Daniel Didier "does have some medically imposed restrictions, he has not met his burden of showing that the extent of his limitations due to his impairment are 'substantial.'"[13] According to the court, since Mr. Didier was able to perform activities of daily living, "such as shaving and brushing his teeth, with his left hand. . . . he does not have a disability as defined under the first prong of the ADA."[14]

As an organization that represents veterans with disabilities, men and women who have served honorably in our nation's military, we believe that the Court has erred by ignoring case precedent and legislative history when modifying the definition of disability under the ADA. PVA members and members of other veterans' service organizations have made sacrifices for our country to preserve democracy and uphold our freedoms. We will not dishonor their service by allowing their civil rights to be limited.

The ADA Restoration Act (HR 3195) will amend the definition of "disability" so that individuals that Congress originally intended to protect from discrimination are covered under the ADA and the courts may not consider "mitigating measures" when deciding whether an individual qualifies for protection under the law. PVA calls on Congress to pass HR 3195 and restore the ADA to its original intent.

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[12] *Id.* at 1297.
[13] Didier v. Schwan Food Co., 387 F. Supp. 2d 987, 991 (W.D. Ark. 2005).
[14] *Id.*

Information Required by Rule XI 2(g)(4) of the House of Representatives

Pursuant to Rule XI 2(g)(4) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2006

Court of Appeals for Veterans Claims, administered by the Legal Services Corporation — National Veterans Legal Services Program— $244,611 (estimated).

Fiscal Year 2005

Court of Appeals for Veterans Claims, administered by the Legal Services Corporation — National Veterans Legal Services Program— $193,019.

Paralyzed Veterans of America Outdoor Recreation Heritage Fund – Department of Defense –
$1,000,000.

Fiscal Year 2004

Court of Appeals for Veterans Claims, administered by the Legal Services Corporation — National Veterans Legal Services Program— $246,541.

CASES WHERE PLAINTIFF SATISFIED BURDEN TO PRESENT EVIDENCE OF SUBSTANTIAL LIMITATION[1]

CASE	IMPAIRMENT	SUMMARY
Fiscus v. Wal-Mart Stores, Inc. 385 F.3d 378 (3d Cir. 2004)	kidney failure	Employer argued that the employee's kidney failure was not a disability because she functioned well given her kidney dialysis treatments. The court rejected this argument, noting that although a court must assess substantial limitation "in light of any corrective measures plaintiff uses," the "time-consuming and cumbersome" corrective measures can themselves be evidence of a substantial limitation.
Nawrot v. CPC Int'l, 277 F.3d 896 (7th Cir. 2002)	diabetes	The plaintiff sufficiently demonstrated that his diabetes substantially limited "his ability to think and care for himself, which are both major life activities."
Sinclair Williams v. Stark, 2001 U.S. App, LEXIS 5367 (6th Cir. 2001)	hypertension	Hypertension, which causes someone to miss nearly three months of work, could be considered "substantially limiting."
Lawson v. CSX Transp., 245 F.3d 916 (7th Cir. 2001)	diabetes	The court noted that the side effects of insulin could cause substantial limitations for plaintiff. Specifically, the court stated that the "multiple insulin injections" that plaintiff takes each day can cause hypoglycemia, resulting in slurred speech, profuse sweating, paleness, and an unsteady walk.
Mattice v. Mem'l Hosp. of South Bend, Inc., 249 F.3d 682 (7th Cir. 2001)	panic disorder	The Seventh Circuit held a hospital anesthesiologist who was treated for depression and panic disorder could proceed with a claim of wrongful discharge under the ADA because he was regarded as substantially limited in "*cognitive thinking*"
Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69 (2d Cir. 2000)	dyslexia	The Second Circuit held that *reading* is a major life activity in an action brought by a dyslexic applicant who was denied reasonable accommodation when she took the bar examination

[1] This chart is provided in connection with Lawrence Z. Lorber's October 4, 2007 testimony on the ADA Restoration Act 2007 before the House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Civil Liberties.

McAlindin v. County of San Diego, 201 F.3d 211 (9th Cir. 2000)	impotence	*Sexual activity*, in addition to reproduction, is a major life activity, the Ninth Circuit ruled. The plaintiff claimed his panic disorder and medications for the condition caused impotence. The court also ruled that sleeping is a major life activity and that difficulty interacting with others may be a substantial limitation in a major life activity.
EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999)	cancer	The court noted that the plaintiff's "long hospital stay and his isolation from others," which were results of plaintiff's cancer treatments, "may also be considered as the limitations" of his major life activities.
Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999)	mental disability	The court noted a drug's "side effects can be important in evaluating whether someone is disabled." In this case, the court pointed out that the lithium taken by the plaintiff for her mental impairment may "itself cause a number of side effects," such as nausea and interference with her ability to think, concentrate, and remember.
McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999)	mental disorder	The court noted that the employee may be substantially limited in sexual relations where he was impotent as a result of medications he took for his mental disorder.
Bell v. S.W. Bell Tel. Co., 194 F.3d 946 (8th Cir. 1999)	prosthesis	The court noted that, in addition to having a "pronounced limp" because of residual effects from polio, the plaintiff's "full range of motion in his leg is limited by the brace" he wore for his condition.

Not Exactly What We Intended, Justice O'Connor

By Steny H. Hoyer
Washington Post
Sunday, January 20, 2002; Page B01

Earlier this month, Supreme Court Justice Sandra Day O'Connor said she understood the intent of Congress -- what my fellow lawmakers and I meant -- when we wrote and then enacted the Americans with Disabilities Act in 1990. She never asked for my view; the court doesn't work that way. Still, in four places in her opinion, Justice O'Connor cited a phrase or context to invoke what "Congress intended." Then she and her fellow justices unanimously narrowed the scope of the act and ordered a lower court to reconsider a decision that allowed a woman suffering from carpal tunnel syndrome to be excused from certain tasks at a Toyota Motor plant in Kentucky. Casting doubt on the woman's right to protection under the legislation, O'Connor wrote that a disability must substantially limit major activities "that are of central importance to most people's daily lives."

It is difficult to say, based solely on the letter of the law as we wrote it, that O'Connor is wrong. But as the congressman who shepherded the legislation through the House of Representatives, I believe that the "intent of Congress" was clearly more expansive than Justice O'Connor's ruling would suggest.

It is not unusual for the Supreme Court to invoke "the intent of Congress" in interpreting the Constitution or pieces of legislation. It helps make our Constitution and laws living documents instead of dead letters. But divining the intent of Congress, even a decade ago, can be tricky business, especially given the compromises and disparate motives that go into the making of legislation.

In this case, I know a lot about the intent of Congress and how the Americans with Disabilities Act came into being. The story sheds light on what we meant by disability and on the perils of judicial attempts at retroactive mind reading. The original sponsor of the ADA in the House was Tony Coelho, then a California Democrat and majority whip. Coelho had a personal interest in the bill. After a head injury suffered as a child, Coelho developed epilepsy. This would not fit the court's definition of something that prevented Coelho from performing major life activities. Unless someone told you about his epilepsy, you would never know he had it. Yet because of misconceptions about the effects of epilepsy, he had been expelled from a seminary, had his driver's license revoked, been discriminated against by health insurers, and rejected by the armed services. When Coelho resigned from Congress in 1989, he asked that I take over stewardship of the bill. My wife also had epilepsy, though it was under control. So I knew of the prejudice such illnesses can evoke. And it contributed to my belief that a range of illnesses should be covered by the ADA and should not disqualify a person from employment or cause discrimination.

This highlights a crucial issue in the ADA debate: perceptions are important to overcome, too. Many medical conditions, like mental illness, if treated properly, are not debilitating. In our minds, it was important to protect not only people who had genuine trouble functioning normally, but also people whose employers might wrongly perceive as being substantially impaired. When writing the legislation, we

borrowed the definition of handicapped from the Rehabilitation Act of 1973, which applied to federal grant recipients. We did this because the courts had generously interpreted this definition. Moreover, we thought using established language would help us avoid a potentially divisive political debate over the definition of disabled. The ADA was designed to extend protection to people working in the private sector and seeking access to public accommodations, transit systems and communications networks. So we simply adopted the definition of disability from language in the 1973 act.

Justice O'Connor cited that language in her opinion earlier this month. That's where she found reference to an illness "that substantially limits one or more of the major life activities of [an] individual." Ella Williams, the woman at the Toyota plant who had carpal tunnel, might not be able to prove her condition blocks her from one of life's major activities, such as walking, seeing or hearing. O'Connor said that "household chores, bathing and brushing one's teeth" were also the types of tasks the court of appeals should have considered in deciding whether Williams was "substantially limited" in performing manual tasks.

Is this what we had in mind when we passed the ADA -- that lawyers for businesses and individuals should spend time and money arguing about whether people can brush their teeth and take out the garbage? Not at all. The whole tenor of the debate at that time was far broader. For example, we defeated an amendment introduced by Rep. Jim Chapman (D-Tex.) to protect restaurant owners who refused to hire people with HIV/AIDS. The restaurant owners wanted the law to specifically exclude HIV/AIDS from the definition of disability. No disability, no protection. The restaurant owners' association argued that if, medical evidence to the contrary, the public perceived that people could transmit AIDS by handling food, and people would avoid restaurants that employed such people. But the majority in Congress wanted AIDS sufferers, and others perceived as disabled, to be covered by the ADA, so in the end the law did not mention the issue.

There could of course be 535 different answers about the intent of Congress when it passed the ADA. It passed both houses by wide margins: 403 to 20 in the House and 76 to 8 in the Senate. Several committees and subcommittees in the House -- including the telecommunications, education and labor, judiciary, and transportation committees -- weighed different sections. I led the battle on the House floor. On the Senate side, the legislation was co-sponsored by Tom Harkin (D-Iowa), Robert Dole (R-Kan.) and 32 other senators. If anything, Harkin had a more expansive definition of disability than I did. His deaf brother was sent to the Iowa School for the Deaf and Dumb, where students were taught one of only three trades: baker, printer or cobbler. And Dole, who suffered a debilitating injury to his right arm in World War II, was also a strong and leading advocate of the ADA.

When we wrote the ADA, we estimated that 43 million people would be covered. That seemed like a lot and we thought that showed we intended the law to be broad rather than narrow. Until the ADA passed, the average guy thought of a disability as something that meant you couldn't walk or see or hear. Our broader estimate helped build support for the legislation. Now, however, O'Connor has cited that figure to say that carpal tunnel and other conditions might push the national total of people protected under the ADA far beyond 43 million and that Congress did not intend that. "If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much

higher," she wrote. But the number we used wasn't designed to limit the effect of our legislation, but to show its breadth.

When President George H.W. Bush signed the Americans with Disabilities Act in July 1990, partisans on both sides of the aisle rejoiced that we had made our nation a better place for everyone. Bush said, "with today's signing of the landmark ADA, every man woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom." Has our vision come to fruition? Yes and no.

The ADA has clearly helped people with some disabilities. It has transformed how architects design buildings, how conference organizers plan events, and how states provide services to people with mental illness and retardation. But defense lawyers in recent years have concocted novel arguments to exclude impairments that do not sufficiently limit a major enough activity. People with diabetes, heart conditions, cancer and mental illnesses have had their ADA claims kicked out of court because, with improvements in medication, they are "too functional" to be considered "disabled." One trial judge ruled that a salesman who tried to return to work after recovering from a heart attack was not "disabled," and therefore not entitled to protection when his employer fired him because it feared he would not be as productive as before.

Recent studies show that plaintiffs lose 90 percent of ADA claims, mostly on the grounds that they are not disabled enough. Ironically, that includes a majority of claims brought by Coelho's fellow epileptics. The ADA has become a "Lawyers' Employment Act," instead of the "People's Empowerment Act" we intended it to be.

So perhaps the most striking thing about the Supreme Court's decision this month in Toyota Motor Manufacturing v. Williams is how we and the advocates for the disabled failed to anticipate what this court's views of our views would be.

Our responsibility now is to revisit both our words and our intent in passing the ADA. In matters of statutory interpretation, unlike constitutional matters, Congress has the last word. We can decide whether the employment policy effectively put into place by the Supreme Court's interpretations of the ADA is a solid one. Or we can decide to rewrite the statute. In either case, Congress must look at this landmark civil rights law and determine whether it is carrying out the promise and potential we all celebrated in 1990.

Steny Hoyer, a Democrat, represents Maryland's 5th Congressional District in the House of Representatives

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